Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLAUDE W. THOMAS, PETITIONER

v.

CITY OF NEW YORK, BENDINER AND SCHLESINGER, QUEST DIAGNOSTICS INCORPORATED, LABORATORY CORPORATION OF AMERICA HOLDINGS AND KERRY KELLY, M.D.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Summary Order filed in the Second Circuit on January 7th, 2009, affirmed the Eastern District Memorandum Opinion and Order of July 24, 2007 that by signing the Stipulation and Agreement dated July 21, 1999, petitioner waived his right to contest any conduct of the New York City Fire Department, its employees and representatives. Petitioner was fired from his position as Firefighter First Grade when a controlled substance, morphine, was found to be present in a specimen attributed to him. Petitioner's toxicology expert averred in a sworn statement and report that respondents' drug screening tests fail to disclose the total absence of metabolite, the by-product manufactured by the body which measures the quantity of drug ingestion. Analysis of the drug screening tests shows that the raw undigested drug was present in the specimen. Respondents do not challenge the expert's findings.

Four questions result:

I. Where petitioner demonstrated through a fórensic toxicology expert that he did not ingest or otherwise use a controlled substance but where the raw drug was present in his urine specimen, did petitioner waive his right to due process precluding the commencement of this action?

II. Where petitioner demonstrated through a forensic toxicology expert that he did not ingest or otherwise use a controlled substance but where the raw drug was present in his urine specimen, did petitioner

violate the terms of the Stipulation and Agreement banning drug consumption?

III. In the absence of proof of drug ingestion, where no metabolite was found or detected in the specimen, was petitioner deprived of equal protection and due process of law by his firing?

IV. In affirming the Eastern District's Memorandum Opinion and Order of July 24, 2007, did the Second Circuit's use of a Summary Order having no precedential effect create a two tier system of justice thus facilitating the denial to petitioner of due process and equal protection of the law?

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Summary Order of the United States Court of Appeals for the Second Circuit appears in the Appendix at pages 1a-5a. [305 Fed. Appx. 754; 2009 U.S. App. LEXIS 121 (2d Cir. N.Y., Jan 7, 2009)]

The Memorandum Opinion and Order of July 24, 2007 filed by the United States District Court for the Eastern District of New York appears in the Appendix at pages 6a-32a and is reported at 2007 U.S. Dist LEXIS 53891.

The Memorandum Opinion and Order of November 19, 2004 filed by the United States District Court for the Eastern District of New York appears in the Appendix at pages 33a-85a.

The Memorandum Opinion and Order of April 1, 2004 filed by the United States District Court for the Eastern District of New York appears in the Appendix at pages 86a-145a.

JURISDICTION

The Second Circuit's Summary Order was rendered on January 7th, 2009. A timely Petition for Rehearing requesting a Rehearing En Banc was denied on March 17th, 2009. [App. 142a] This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

18 U.S.C. §1962
PROHIBITED ACTIVITIES

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through

collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

42 U.S.C. §1981
EQUAL RIGHTS UNDER THE LAW

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and

enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1983
CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1985
CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to

by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice—President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy,

whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

USCS FED RULES APP PROC R 32.1
CITING JUDICIAL DISPOSITIONS

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

STATEMENT

Petitioner was fired from his position as Firefighter First Grade when a controlled substance, morphine, was found to be present in a specimen attributed to petitioner. Petitioner denied use of the drug or the consumption of any food that might trigger

a false positive. Petitioner's toxicology expert averred in a sworn statement that the respondent laboratories do not disclose in their respective drug screening reports the presence of metabolite, the by-product of drug ingestion. As respondents do not challenge these findings, a fortiori, petitioner is not guilty of drug use or consumption.

This action was commenced on April 14th, 2003 against the City of New York, New York City Fire Department ("FDNY"), Kerry Kelly, M.D., FDNY's Medical Review Officer, Bendiner & Schlesinger ("B&S"), Quest Diagnostics Incorporated ("Quest"), Laboratory Corporation of America Holdings ("LabCorp."), and the Uniform Firefighters Association. B&S performed the first drug screening test yielding results above FDNY's cut-off of 300 ng/mLs but below 2000 ng/mLs, the cut-off concentration of the Department of Transportation. ("DOT") Petitioner paid Quest to perform a second drug screening test yielding results below FDNY and DOT cut-off concentration.[1] The Eastern District

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[1] "...each laboratory is on a short list of New York State approved laboratories for drug testing. In addition, each laboratory appears to adhere to cutoff standards employed by the FDNY, which are lower than those adopted by the DOT. It is also clear that the laboratories are entwined in the employment procedures of the FDNY, as they are responsible for the drug testing which, with a positive result, can lead to the termination of one's employment with the FDNY."

> "...the laboratories appear on this list specifically because when testing samples from state employees, they adhere to a policy adopted by either the New York State or the FDNY. See *Griffin v. Long Island Railroad*, 96-CV-4673, 1998, U.S. Dist. LEXIS 19336, n. 7 (E.D.N.Y. June 5, 1998)

concluded, "...facts alleged clearly indicate that the alleged actions of defendants led to plaintiff's termination." [App. 110a]

Petitioner submitted hair samples taken by his private physician for drug analysis and the hair follicle test was negative.[2] In its Memorandum Opinion and Order of April 1st, 2004, the Eastern District found that petitioner satisfied two of the three elements for a procedural due process claim:

> The parties do not contest that plaintiff had a property interest in his employment with the FDNY. In addition, the parties have not asserted, nor does it appear to be the case, that plaintiff, in signing the Stipulation, forfeited his property interest in his employment and, as a consequence, the general procedural protections that attend that interest. See *Griffin v. Long Island Railroad*, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, n.8 (E.D.N.Y June 5, 1998); *Medellin v. Chicago Transit Auth.*, 93-CV-6091,

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(noting that if the railroad was a private entity, its compliance with regulations compelling drug testing would mean it was acting as an instrument of the government) (citing *Skinner v. Railway Labor Executives's Ass'n*, 489 U.S. 602, 614 (1989)."

[App. 103a, 104a]

[2] According to Richard G. Dudley, Jr., M.D., a psychiatrist who treated petitioner for job related stress, the hair follicle screening test determines if a person ingested opiates for a period from several weeks to several years prior to the screening test. Petitioner tested negative. [App. 89a]

> 1994 U.S. Dist. LEXIS 1037, (N.D. Ill. July 28, 1994). Furthermore, the facts alleged clearly indicate that the alleged actions of defendants led to plaintiffs termination. Accordingly, plaintiff's complaint satisfies the first two elements of a claim for relief for deprivation of procedural due process.

[App. 110a]. However, as to the third element, the Eastern District found that petitioner waived due process. On July 21, 1999, petitioner entered into a Stipulation and Agreement which provided *inter alia:*

> That Firefighter Thomas understands that, for the entire duration of his employment with the Department, in the event of any violation of this agreement...from the date of this stipulation, he will be terminated without a hearing of any kind, and Firefighter [Thomas] hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules and any applicable collective bargaining agreement.

[App. 110a]. Neither the Eastern District nor the Stipulation address the absence of wrong doing or that the absence of such wrong doing would devolve into a violation of the Stipulation. The Eastern District concludes that the mere presence of the drug, regardless of how the drug came to be present in the specimen created wrong doing, and by extension, substantiated petitioner's firing. The Second Circuit affirmed this rationale with a twist of the facts by asserting in error, "...the presence of morphine in his

system had a different cause..." Petitioner's forensic toxicology expert swears that the drug was raw, was not metabolized (was not in his system) and was not used or consumed by petitioner. Respondents do not dispute or rebut these findings.

Petitioner sued B&S, the laboratory under contract to the City of New York for workplace testing, for its failure to properly report its findings, for faulty and improper testing procedures, for violating 49 C.F.R. §40.33, for breaking the chain of custody when on November 25th, 2002 B&S allegedly sent petitioner's specimen to Quest by Airborne overnight for confirmatory testing, it arrived and was logged in on December 2, 2002. Petitioner sued Quest for issuing a false laboratory report in that it failed to disclose that the absence of metabolite precludes use or consumption of drug. Petitioner paid Quest for the confirmatory test in order to exonerate himself.

LabCorp. is sued for failing to provide results of its confirmatory test of the disputed urine specimen for which Lab.Corp. charged and received a fee for drug screening analysis of the specimen.

Kerry Kelly, M.D., a qualified "Medical Review Officer" specifically trained pursuant to Department of Transportation Regulations for workplace drug testing, was responsible for analyzing and reviewing laboratory reports. Dr. Kelly failed to detect the absence of metabolite in the laboratory reports of B&S and Quest. Careful review of the laboratories' screening test results should have alerted Dr. Kelly to the anomalous presence of morphine in the absence of metabolite. The laboratory reports are the basis for petitioner's firing.

REASONS FOR GRANTING THE PETITION

By Summary Order, the Second Circuit determined that petitioner waived his right to challenge the propriety of the testing and handling of his urine specimens stating, "These arguments regarding the propriety of the testing and handling of his urine specimens were precisely the types of claims Thomas agreed not to make when he signed the Stipulation. See *Montiel v. Kiley*, 147 A.D.2d 402, 538 N.Y.S.2d 2 (App. Div 1989)." [App. 4a] Respondents' loss of the split specimens, the existence of broken security seals on the specimen containers and the absence of metabolite in the specimen create an inference that the specimen was tampered with while in respondents' custody. To suggest that petitioner knowingly granted the employer an unfettered right to engage in misconduct or to suggest that he condoned unlawful activity is a reversal of law in the Second Circuit. There was insufficient notice in the Stipulation of such a drastic waiver. *Morris v. The New York City Employees Retirement System*, 129 F. Supp.2d 599 (2001) A waiver is defined in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938) as, 'an intentional relinquishment of a known right or privilege' as discussed in *Morris*, at 608. Such a waiver must be voluntary and intelligently waived with full awareness of the legal consequences. *Overmyer Co., Inc., of Ohio et al. Frick Co.* 405 U.S. 174; 92 S. Ct. 775; 31 L. Ed. 2d 124 (1972) found that as between two corporations with corporate counsel having drafted the waiver, petitioner knowing relinquished constitutional rights. However, where an individual's waiver is in issue, whether in a civil or criminal action, the burden is upon the party asserting

the validity of the waiver. Remarkably, the Respondent City of New York filed two Answers to the complaint and respondents collectively filed three motions to dismiss but at no time did any respondent raise as an affirmative defense that the Stipulation precluded commencement of this action or, that where drug screening tests fail to detect use or consumption of a drug, the mere presence of the drug in the specimen constitutes a waiver of petitioner's claim of procedural due process. The Second Circuit affirmed that it is constitutional to waive the right to defend in advance of the dispute no matter what defenses petitioner has. [App 1a-5a] Petitioner disagrees.

The respondent employer acknowledges clearly and emphatically that petitioner was diagnosed by the employer's psychiatrists as suffering from job-related situational stress and he was being treated privately by a psychiatrist who recommended and requested of the employer leave of absence which the employer summarily denied leave. The employer acknowledges and the Joint Appendix filed in the Second Circuit demonstrates that the petitioner was under such care and treatment when he entered the Stipulation, and unintelligible multi-paged document is filled with unexplained legal citations that are meaningless to the lay public.

The Second Circuit's omission of any discussion of these poignant facts or the disparity between petitioner's Stipulation and the Stipulations appearing in the Joint Appendix of eleven white firefighters, highlights the inefficient, result-oriented summary

order issued by the Second Circuit, effectively "sweeping the case under the judicial rug."[3]

Deeply embedded in the American System of Jurisprudence is equal application of the law regardless of race, creed, color and ethnicity.

> "The constraints of *stare decisis* are thought to be fundamental to the judicial process. *Stare decisis* which 'serves to take the capricious element out of law and to give stability to a society,' is rendered completely ineffective and 'cannot operate as a 'workable doctrine' as long as Courts...are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other."[4]

A two-tier system of jurisprudence exists pursuant to the Second Circuit's Local Rule 32.1 and the Federal Rule of Appellate Procedure §32.1, a system that permits results that are separate and unequal. [*See Plessy v. Ferguson, 163 U.S. 537 (1896);*

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[3] Kanner, Gideon, The Unpublished Appellate Opinion Friend or Foe?, CAL S. B. J., p. 391

[4]Schmier, Kenneth J. and Schmier, Michael K., Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis, quoting William Douglas, Stare Decisis, 49 Colum. L. Rev. 735,736 (1949) and Gideon Kanner, The Unpublished Appellate Opinion: Friend or Foe? 48 CAL. ST. B. J. 386, 445 (1973) (quoting Seligson & Warnloff, The use of Unreported Cases in California, 24 Hastings L. J. 37, 53 (1972); The Journal of Law and Social Challenges, Vol. 7, p. 235.

Missouri EX REL. Gains v. Canada Registrar of the University of Missouri,305 U.S. 337 (1938); *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954) reargued 349 U.S. 294 (1955); *Griffin v. County School Board of Prince Edward County Virginia*, 377 U.S. 218 (1964)]

The application of FRAP §32.1 almost always insures that appellate review will be denied. While the issues addressed herein are salient, the invocation of FRAP §32.1 almost always insures that cases so designated will be treated as trivial when presented for appellate review. Summary order denies judicial analysis of the issues thus depriving petitioner of the chance to petition on an equal footing with other litigants. [*See Evitts v. Lucey*, 469 U.S. 387 (1985) *and Lindsey v. Normet*, 405 U.S.56, 77, (1972)] Denial of this chance to compete on an equal footing is tantamount to the denial of a substantial right.

As articulated in *United States v. Olano, Jr. and Gray*, 507 U.S. 725, 733; 113 S.Ct. 1770; 123 L.Ed.2d 508 (1993), "...waiver is the intentional relinquishment or abandonment of a known right." Here, where respondents raised no objections to the commencement of this action in the face of the Stipulation, where respondents failed to challenge the expert findings, where respondents prevented timely analysis of DNA genetic markers present in the specimen and where respondents failed to disclose the absence of metabolite, the only indicia proving drug use and consumption, it was error to treat this case as insignificant and trivial through summary order disposition having no precedential effect.

The violation of a "substantial right has to do with correcting an error whether the error 'seriously affects the fairness, integrity or public reputation of the judicial proceedings'" *United States v. Thomas*, 274 F.3d 655, 671 (2d Cir. 2001); remanded 116 F.3d 606 (1997); appeal after remand 204 F.3d 381 (2d Cir. N.Y. 2000) Denial of the writ of certiorari will result in a miscarriage of justice.

While the Second Circuit found that the petitioner's Title VII, hostile work environment and retaliation claims were not barred by the Stipulation, the Court did not consider that the impropriety of the testing and handling of urine specimens was a manifestation of those claims. Petitioner reasonably believed that when he signed the Stipulation and Agreement dated July 21st, 1999 that the waiver was presumptively legal and he did not believe that he waived his right to challenge questionable or illegal activity engaged in by his employer or agent of his employer or its representatives. As the laboratories were acting as instruments of government, and "...because plaintiff would not necessarily have 'known or have reason to know' of defendants allegedly discriminatory motive at the time he entered the stipulation and agreement, the date of entry into the agreement should not serve as the date of accrual." [App. 60a, 61a] At the time that petitioner entered the agreement, he had no reason to doubt that similarly situated white employees were subject to the same type of agreement and that such agreements were enforced in a similar fashion. [App. 104a, 105a]

"Finally, the complaint meets the test for state action because the facts alleged suffice to permit an

inference that the laboratory defendants performed testing and held custody of the plaintiff's urine sample at the direction of the FDNY, that such actions were in furtherance of enforcement of the FDNY's drug testing regime, and that the actions of the laboratories in so doing were the responsibility of the FDNY. *See Coleman v. Town* of *Hempstead*, 30 F. Supp.2d 356, 362 (E.D.N.Y. 1999)." [App. 104a, 105a]

> "...because plaintiff would not necesarily have "known or had reason to know" of the defendant's allegedly discriminatory motive at the time he entered the Stipulation and Agreement, the date of entry into the agreement should not serve as the date of accrual. At the time he entered the agreement, plaintiff had no reason to doubt that similarly situated white employees were subject to the same type of agreement and that such agreements were enforced in a similar fashion. Plaintiff's complaint gives rise to the inference that when he entered the Stipulation and Agreement, he did not know nor did he have reason to know that it was more cumbersome and more strictly enforced than for similarly situated white firemen. Thus, the date of accrual would not be July 21, 1999, the date he entered into the agreement, but rather when he knew or had reason to know the allegedly discriminatory motive."

[App. 60a, 61a]

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Supreme Court grant review.

Respectfully submitted,

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No. 07-3498-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LAUDE W. THOMAS,
Plaintiff-Appellant,
v.
CITY OF NEW YORK, BENDINER AND SCHLESINGER, QUEST DIAGNOSTICS INCORPORATED, LABORATORY CORPORATION OF AMERICA HOLDINGS AND KERRY KELLY, M.D.,
Defendants-Appellees,
UFA UNIFORM FIREFIGHTERS ASSOCIATION AND THE NEW YORK CITY FIRE DEPARTMENT,
Defendant.

January 7, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: Appearing for Appellant: Regina Felton, Felton & Associates, Brooklyn, New York.

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Appearing for Appellee Bendiner and Schlesinger: Louis Klein, Martin Clearwater & Bell LLP (Nancy A.

Breslow, Rosaleen T. McCrory, of counsel), New York, New York.

Appearing for Appellee Quest Diagnostics: Lori Semlies, Wilson, Elser, Moskowitz, Edelman & Dicker LLP (Richard E. Lerner, of counsel), New York, New York.

Appearing for Appellee Laboratory Corporation: Demetrios Batsides, Gibbons P.C. (Paul Asfendis, of counsel), New York, New York.

JUDGES: PRESENT: HON. AMALYA L. KEARSE, HON. ROBERT D. SACK, HON. ROBERT A. KATZMANN, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be, and it hereby is, affirmed.

Plaintiff Claude W. Thomas appeals from a July 24, 2007 memorandum opinion and order of the United States District Court for the Eastern District of New York, granting summary judgment to the then-remaining defendants, the City of New York (the "City") and Dr. Kelly on all claims. Thomas also appeals from the dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(6), of his claims against defendants Bendiner and Schlesinger, Quest Diagnostics, and Laboratory Corporation (the "laboratory defendants"), by memorandum and order dated November 18, 2004.

We assume the parties' familiarity with the underlying facts and procedural history of the case.

Central to this appeal is a Stipulation and Agreement dated July 21, 1999 ("the Stipulation") entered into between Thomas and the City permitting his continued employment as a firefighter despite a positive drug-test result. With but a few exceptions, Thomas's claims in this lawsuit are barred by the terms of the Stipulation. The appeal therefore largely turns on the Stipulation's validity and enforceability.

Thomas, an African-American, asserts that the Stipulation is invalid because it was entered into in violation of 42 U.S.C. § 1983. Similarly-situated firefighters of European descent in similar circumstances, he alleges, were not required to enter into similar agreements. We need not address the issue of whether such discrimination, if proved, would render the Stipulation invalid. Thomas has not proffered evidence sufficient to permit a reasonable juror to conclude that the City discriminated against him because of his race by requiring that Thomas enter into the Stipulation.

The Stipulation provides that "the finding of the presence of alcohol, marijuana or any other controlled substance in [Thomas's] blood or urine will be deemed to be a violation of this agreement." It later provides that "in the event of any violation of this agreement . . . [Thomas] will be terminated without a hearing of any kind." Thomas argues that he did not ingest drugs and that the presence of morphine in his system had some different cause, and that he therefore did not violate the Stipulation. But he has presented no legal authority

for the proposition that the City of New York was required to consider, let alone agree with, this argument, raised for the first time years after Thomas was dismissed from his job. These arguments regarding the propriety of the testing and handling of his urine specimens were precisely the types of claims Thomas agreed not to make when he signed the Stipulation. *See Montiel v. Kiley*, 147 A.D.2d 402, 538 N.Y.S.2d 2 (App. Div. 1989).

Two of Thomas's claims, those based on alleged actions of Captain Blume on November 15, 1999, and December 17, 1999, which are brought under Title VII and allege a hostile work environment and retaliation, are not barred by the Stipulation. The district court nonetheless correctly granted summary judgment to the City on these claims.

To prevail on such a hostile work environment claim, a plaintiff must show conduct that is "severe and pervasive enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (internal quotation marks omitted). "For racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity." *Id.* (internal quotation marks omitted). The district court did not err in concluding that no reasonable juror could infer that these two incidents were severe or pervasive enough to create a hostile work environment.

The court also did not err in granting summary judgment on the retaliation claim. The two incidents involving Captain Blume occurred before the plaintiff

filed the EEOC claim that allegedly triggered the retaliation. They could not, therefore, have been in retaliation for the claim. And to the extent that the retaliation claim was based on other events that are referenced in the complaint, it is barred by the Stipulation.

In its opinion of November 18, 2004, the district court properly dismissed all claims against the laboratory defendants under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. No facts alleged by Thomas could give rise to a permissible inference of misconduct or discrimination by any of the laboratory defendants. And the district court correctly dismissed the plaintiff's claims brought pursuant to 42 U.S.C. § 1985 inasmuch as his allegations were entirely conclusory.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

CV-03-1797 (CPS)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Claude Thomas,
Plaintiff,

- against -

The City of New York, Bendiner and Schlesinger, Quest Diagnostics Incorporated, Laboratory Corporation of America Holdings, and Kerry Kelly, M.D.,
Defendants.

July 24, 2007, Decided
July 25, 2007, Filed

COUNSEL: For Claude W. Thomas, Plaintiff: Regina Felton, LEAD ATTORNEY, Felton & Associates, Brooklyn, NY.

For City of New York, M.D. Kerry Kelly, Defendants: Amy Grossberg, LEAD ATTORNEY, New York City Law Department, New York, NY; Andrez Shumree Carberry, LEAD ATTORNEY, New York City Law Department, Labor and Employment Division, New York, NY; Danielle Marie Dandridge, LEAD ATTORNEY, NYC Law Department, New York, NY.

For New York City Fire Department, Defendant: Danielle Marie Dandridge, LEAD ATTORNEY, NYC Law Department, New York, NY.

For Bendiner and Schlesinger, Defendant: Nancy A. Breslow, LEAD ATTORNEY, Nancy J. Block, Martin Clearwater & Bell LLP, New York, NY.

For Quest Diagnostics Incorporated, Defendant: Lori Semlies, LEAD ATTORNEY, Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP, New York, NY.

For Laboratory Corporation of America Holdings, Defendant: Brian D. Bauman, John L. Harrisingh, LEAD ATTORNEYS, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, New York, NY.

For UFA Uniform Firefighters Association, Defendant: Michael N. Block, LEAD ATTORNEY, Sullivan Papain Block McGrath & Cannavo P.C, New York, NY.
JUDGES: Charles P. Sifton, United States District Judge.

OPINION BY: Charles P. Sifton

MEMORANDUM OPINION AND ORDER

SIFTON, Senior Judge.

Plaintiff Claude Thomas ("Thomas"), a former firefighter with the New York City Fire Department ("NYFD"), commenced this action against defendants City of New York ("City") and Kerry Kelly, M.D. ("Dr. Kelly"), alleging that defendants conspired to deprive him of rights under the Department of Transportation drug testing regulations[1], based on his race, violating his due process and equal protection rights, and discriminating against him on the basis of disability. Plaintiff also alleged RICO claims under 18 U.S.C. §

1962, Title VII claims of race discrimination and retaliation against the City of New York under 42 U.S.C. §§ 2000e to 2000e-17 and 42 U.S.C. §§ 1981, 1983, and 1985, and disability discrimination claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. [2] The litigation arises out of the NYFD's termination of plaintiff's employment based on a urinalysis that was positive for the presence of a controlled substance. Presently before the Court are plaintiff's and defendants' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, summary judgment is granted in favor of all of the remaining defendants.

Background

The facts are drawn from the Third Amended Complaint, previous decisions in this case, defendant City's Rule 56.1 Statement[3], and the parties' submissions in connection with these motions. Disputes are noted.

Plaintiff, an African-American male, joined the New York City Fire Department on November 12, 1989 as a Firefighter First Grade. On July 21, 1999, plaintiff signed a Stipulation and Agreement ("Stipulation") with the FDNY in which plaintiff admitted to the use of a controlled substance on May 24, 1999, leaving the scene of an accident on June 7, 1999, and violating the FDNY's Oath of Office. The Stipulation provided that plaintiff would in the future be subject to frequent random testing for controlled substances.

After signing the Stipulation, plaintiff says he was

subject to verbal abuse from commanding officers in the presence of coworkers and others. One such incident allegedly occurred on November 15, 1999. A Captain Blume is said to have yelled at plaintiff, using expletives, for not moving quickly enough when ordered upstairs. In the presence of a Bureau of Investigation and Trials ("BIT") officer, Captain Bloom allegedly "placed his index finger on plaintiff's cheek and screamed in plaintiff's face "Mother f....r, who do you think you are? When I give you a f...ing order, you better listen boy, you f...ing a..hole." (Comp. ¶ 42.) Captain Blume suspended plaintiff for 30 days without pay and according to the Complaint, said to plaintiff as plaintiff was changing into civilian clothes, "we got you nigger." (Comp. ¶¶ 48-49).

Plaintiff returned to the firehouse from his suspension on December 17, 1999 and was immediately suspended for another 30 days by Captain Blume for allegedly not turning the volume down on the television quickly enough when ordered to do so. Plaintiff, suffering severe chest pains as a result of the confrontation, was removed from the fire house by Emergency Medical Services. Plaintiff was, at the time, taking antidepressant medication and was being treated by Dr. Richard G. Dudley, Jr., a psychiatrist, for job-related stress. Dr. Dudley subsequently submitted a letter to the FDNY, dated February 14, 2000, requesting medical leave on behalf of plaintiff, which was denied. Dr. Dudley renewed the request by letter dated March 7, 2000, which was again denied. On January 24, 2000 plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC").

Plaintiff's urine was tested for drugs approximately 29 times between July 21, 1999 and October 24, 2002, with negative results each time. Generally, the urine specimens were split into two, a "primary" specimen and a "split" specimen.[4] Pursuant to a contractual agreement with the FDNY, plaintiff's October 24, 2002 urine sample, like all the previous samples, was first tested by the laboratory, Bendiner and Schlesinger ("B & S"). The October 24, 2002 urine specimen tested positive for morphine at 1353 ng/mL (nanograms per milliliter). The FDNY specifies a 300 ng/mL cutoff level for opiates, including morphine. [5] As a result of the positive report, plaintiff was ordered to "stand down" on November 4, 2002, meaning that he was restricted from driving department vehicles and treating injuries.

On November 5, 2002, plaintiff submitted a hair follicle and urine sample to his treating physician, Dr. Dudley, for testing. According to Dr. Dudley's letter to the FDNY, a hair drug screen can determine if a person ingested opiates at any point in time over a period from weeks to years prior to the sample being taken. Both hair and urine samples were tested by Quest Diagnostics, Inc. ("Quest"), a laboratory on the FDNY's list of approved laboratories. The urine tested negative, and according to Dr. Dudley, the hair follicle test was also negative for opiates. Dr. Dudley reported the results to the FDNY on November 14, 2002.

By letter dated November 6, 2002, plaintiff was informed by the FDNY that as a result of the October 24, 2000 positive result and pursuant to the Stipulation, he had seven days to submit a re-test request and present relevant evidence on his behalf before the FDNY took final action. The letter also indicated that

failure to provide "satisfactory and acceptable mitigation" would result in plaintiff's termination on November 21, 2002.

On November 11, 2002, plaintiff submitted another urine sample to a BIT Lieutenant at the Bureau of Health Services, but never received the results from its testing.

On November 14, plaintiff paid a $ 108 fee to have his October 24, 2002 specimen re-tested. In a letter dated November 13, 2002 to Quest, Dr. Kelly, the FDNY Chief Medical Review Officer, requested a re-test of plaintiff's specimen for a confirmation of morphine. At an unknown date, Assistant Commissioner James Drury, on behalf of BIT, sent a urine specimen, attributed to plaintiff, to Quest for a re-test. The request was copied to B & S. A third letter, also undated, was sent from B & S to Quest requesting plaintiff's urine be re-tested for morphine. Which specimen each request relates to and what became of both the primary specimen and the split specimen from B & S is not clear.

Plaintiff alleges that the primary specimen of plaintiff's urine was removed from frozen storage at B & S on November 22, 2002, but it was not sent to Quest for re-testing until three days later on November 25, 2002. Plaintiff alleges that B & S failed to properly refrigerate the specimen in this interval. (Compl. ¶ 91). The specimen was not received by Quest until December 2, 2003. Plaintiff alleges that the specimen container was broken and not intact upon arrival at Quest. (Compl. P93). According to plaintiff's complaint, a December 3, 2002 report from Quest indicates the re-

test of the primary specimen revealed morphine levels of 200 ng/mL, below both the FDNY and DOT cutoff levels.

On November 13, 2002, plaintiff was suspended for 30 days because of the initial positive morphine test of his October 24, 2002 urine specimen. On November 15, 2002, the New York Fire Department published plaintiff's suspension for violating sections of the Regulations for the Uniformed Force governing the use of controlled substances and the oath of office. By letter dated December 4, 2002, plaintiff was notified that he was terminated, effective December 14, 2002. Immediately upon the notification of his suspension and again upon the notification of his termination, plaintiff, denying the use of any controlled substance other than Zoloft, contacted Robert Straub, the Bronx Trustee of the UFA, requesting that he file a grievance on plaintiff's behalf. Plaintiff alleges that no grievance was filed.

On December 24, 2002, plaintiff advised Deputy Commissioner Clinton that he wanted the urine specimens from B & S and Quest to be re-tested to confirm the existence of morphine and to determine their DNA. On December 31, 2002, plaintiff executed an authorization for the transfer of specimens from Quest to LabCorp, also on the FDNY list of approved laboratories. On January 2, 2003, plaintiff paid $ 1500 to LabCorp for the tests. However, on the same date, plaintiff was advised by Susan Mills of Quest that the specimen could not be transferred without FDNY authorization. On January 6, 2003, Quest obtained a mouth swab from plaintiff in Queens for the purpose of determining his DNA characteristics to be transported

to LabCorp. (Compl. ¶142). On January 27, 2003, LabCorp reported that it had not received the urine specimen from Quest, apparently because the specimen was shipped from Quest without being appropriately addressed. The specimen was later found on January 31, 2003.[6] Plaintiff alleges that Ms. Mills of Quest, acting under instructions from the FDNY, only authorized a test for a morphine confirmation. On February 6, 2003, Dr. Kelly transmitted a letter to LabCorp authorizing the DNA testing. Plaintiff was required to pay an additional $ 90 fee to LabCorp. LabCorp did not report its findings with respect to the morphine test, but by letter dated March 10, 2003, LabCorp reported to plaintiff that there were insufficient quantities of DNA in the sample to develop a profile.[7]

Prior to the testing by LabCorp, plaintiff requested a so-called "Litigation Package" from B & S.[8] Plaintiff made the request in writing through his attorney on both December 24, 2002 and January 30, 2003. Receiving no response, plaintiff requested the assistance of Deputy Commissioner David Clinton in a letter dated February 26, 2003, and submitted another letter request to B & S on that same date. By letter dated March 6, 2003, plaintiff, through his attorney, again requested the Deputy Commissioner's assistance in obtaining a Litigation Package from B & S. Eventually, in late March, plaintiff received a letter from William Closson, Director of Forensic Toxicology at B & S, stating that he was prohibited by law from releasing the Litigation Package to anyone other than the "ordering client/physician."[9] (Compl., Exh. M). Plaintiff allegedly never received a Litigation Package from B & S, but received one from Quest on April 1, 2003 after two previous requests in December 2002 and

January 2003 were not responded to. On April 14, 2003, plaintiff filed his original complaint.

Discussion

Plaintiff's remaining claims against the City of New York arise under Title VII (race discrimination and retaliation), Section 1981 [10], Section 1983 (due process and equal protection) [11], the Americans with Disabilities Act and Section 504 of the Rehabilitation Act [12], and Article 15 of the New York State Human Rights Law, New York Executive Law § 290 ("NYSHRL"). [13] Plaintiff's remaining claim against defendant Dr. Kelly arises under 42 U.S.C. § 1981.

Plaintiff seeks reinstatement of his position, a permanent injunction ordering the City of New York to restore all benefits lost as a result of termination and to refrain from further retaliatory acts, and $ 25 million in compensatory damages from defendant City of New York. Plaintiff seeks $ 25 million in compensatory damages and punitive damages from Dr. Kelly. Plaintiff also seeks court costs and attorney's fees.

Summary Judgment Standard

A court must grant a motion for summary judgment if the movant shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A fact is

material when it "might affect the outcome of the suit under the governing law." Id.

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987). In order to defeat such a motion, the non-moving party must raise a genuine issue of material fact. The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). In deciding such a motion the trial court must determine whether "after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir. 2000).

Waiver of Claims in the Stipulation

Defendant City argues that it is entitled to summary judgment as a matter of law despite the numerous disputed factual issues relating to plaintiff's drug testing because plaintiff waived most of his claims when he entered into the Stipulation and Agreement to settle disciplinary charges on July 21, 1999. Paragraph 10 of the Stipulation and Agreement states that "the finding of the presence of alcohol, marijuana or any other controlled substance in [plaintiff's] blood or urine will be deemed to be a violation of this agreement." Stipulation and Agreement ¶ 10. Paragraph 14 provides in relevant part:

> [t]hat Firefighter Thomas understands that, for the entire duration of his employment with the

> Department, in the event of any violation of this agreement or any future misconduct relating to any conviction in a court of law, from the date of this stipulation, he will be terminated without a hearing of any kind, and Firefighter Thomas hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules and any applicable collective bargaining agreement;

Stipulation and Agreement ¶ 14. Under Paragraph 19,

> this Stipulation constitutes a waiver by Firefighter Thomas whereby he is estopped from commencing or continuing any judicial or administrative proceedings or appeal, before any court of competent jurisdiction, administrative tribunal or Civil Service Commission, including but not limited to, actions pursuant to the Civil Rights Act of 1964 or any other Federal Civil Rights Statute, the Age Discrimination Employment Act of 1967, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990 and any applicable contractual grievance procedures, to contest the authority and jurisdiction of the Fire Department to impose the terms and conditions which are embodied in the Stipulation;

Stipulation and Agreement ¶ 19. The Stipulation and Agreement further provides

> [t]hat this Stipulation and Agreement has been

> entered into knowingly, intentionally, without coercion, duress or undue influence having been exerted upon Firefighter Thomas and has been accepted by Firefighter Thomas after having had discussions with, and having been advised thereon by, his counsel.

Stipulation and Agreement ¶ 22.

In my November 18, 2004 decision dismissing the Third Amended Complaint, I affirmed my April 1, 2004 dismissal with prejudice of plaintiff's procedural due process claim "[b]ecause plaintiff explicitly waived his right to a pre- and/or post-termination hearing" in paragraph 14 of the Stipulation and Agreement and "made no allegations that he signed the Stipulation under duress, coercion or without knowledge of the consequences." Memorandum and Opinion, November 18, 2004, No. 03-CV-1797 (CPS), p. 26. [14]

Defendant City of New York now moves for dismissal of plaintiff's Title VII, Rehabilitation Act, Americans with Disabilities Act, Sections 1981 and 1983, and New York State Human Rights Law claims based on the waiver contained in the Stipulation and Agreement. Just as "[i]t is well settled that a public employee may waive his procedural due process protections," Memorandum and Opinion, No. 03-CV-1797 (CPS), April 1, 2004, p. 29 ("April 2004 Memorandum") (citing inter alia *Miller v. Coughlin*, 59 N.Y.2d 490, 494, 452 N.E.2d 1241, 465 N.Y.S.2d 913 (1983)), "[j]udicial acceptance of compromises in which the most fundamental of rights are waived is not uncommon." *David Abramovich v. Bd. of Educ. Of Central School District*, 46 N.Y.2d 450, 456, 386 N.E.2d 1077, 414

N.Y.S.2d 109 (Ct. App. 1979) (also stating that "the comprehensive range of matters on which agreements between litigants or potential litigants is enforceable long ago came to include 'stipulating away statutory, and even constitutional rights.'") (citations omitted). "A party may by contract waive his right to resort to the courts, but he will only be held to have done so if the waiver is explicit." *Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO v. Hartnett*, 119 A.D.2d 877, 500 N.Y.S.2d 571, 572 (Sup. Ct. 1986). The waiver must be "freely, knowingly and openly arrived at, without taint of coercion or duress." *Montiel v. Kiley*, 147 A.D.2d 402, 538 N.Y.S.2d 2, 4-5 (1989), quoted in April 2004 Memorandum, p. 29.

Plaintiff seeks to avoid the effect of the Stipulation by arguing that "plaintiff would be fired if he did not sign the [Stipulation]," Plaintiff's Opposition Memorandum, p. 3; see also Plaintiff's Reply Memorandum, p. 3, and that he was not represented by counsel at the time he signed the document. Id. These arguments do not present a case of coercion or duress sufficient to overcome the bargain struck in the Stipulation. As stated in my April 1, 2004 decision, "the waiver is valid where it 'serves as the quid pro quo for countervailing benefits.'" Memorandum and Opinion, April 1, 2004, No. 03-CV-1797 (CPS), p. 30 (quoting *Abramovich*, 46 N.Y.2d at 455). "[I]n return for signing the Stipulation, plaintiff was able to retain his position as an employee of the FDNY." Memorandum and Opinion, April 1, 2004, No. 03-CV-1797 (CPS), p. 30. Moreover, contrary to his current assertion that he did not have legal representation at the time he signed the document, plaintiff averred that he had been advised by counsel in Paragraph 22 of the Stipulation. *See Morrisroe v. Safir*,

1998 U.S. Dist. LEXIS 15844, 1998 WL 709822, at *1 (S.D.N.Y. 1998) ("The plea document shows that plaintiff was represented by counsel during the disciplinary proceedings. Plaintiff signed the document and acknowledged that he had discussed the plea and its 'ramifications' with his attorney."). Plaintiff's deposition testimony likewise reveals that he understood the terms of the Stipulation. [15] *See Abramovich*, 46 N.Y.2d at 457-58 (dismissing claims based on petitioner's stipulation in part because "even now, from the vantage point of hindsight, petitioner does not seriously controvert his acceptance and understanding of the terms of the stipulation"). Because the waiver of rights in the Stipulation is explicit and without coercion, plaintiff is bound by its terms. Accordingly, with the exception of plaintiff's Title VII and Section 1981 claims regarding hostile work environment and retaliation [16], plaintiff's claims against defendant City of New York under Title VII of the Civil Rights Act, the Rehabilitation Act, the Americans with Disabilities Act, Sections 1981 and 1983, and his New York State Human Rights Law claim must be dismissed in accordance with the Stipulation and Agreement. [17]

Hostile Work Environment and Retaliation [18]

The Supreme Court has interpreted Title VII to prohibit "requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). To succeed on a hostile work environment claim, a plaintiff must show, first, that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently

severe or pervasive to alter the conditions of the victim's employment." *Id.* at 21. Factors to be considered in determining whether an environment is hostile or abusive include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Although "the incidents comprising a hostile work environment claim need not make reference to any trait or condition on the basis of which the discrimination has occurred," they must occur under circumstances under which "the incidents can reasonably be interpreted as having taken place on the basis of that trait or condition." *Svenningsen v. College of Staten Island*, No. 01-CV-7550, 2003 U.S. Dist. LEXIS 25816, 2003 WL 21143076, *2 (E.D.N.Y. 2003); *see Gregory v. Daly*, 243 F.3d 687, 694-695 (2d Cir. 2001). Isolated incidents of offensive conduct are generally inadequate to establish a discrimination claim, and plaintiff must show "either a single incident was extraordinarily severe, or that a series of incidents was sufficiently continuous and concerted" to cause a change in the work environment. *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000) (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000)). "[A]lleged epithets and demeaning invective directed at a plaintiff by his or her superiors or co-workers can, if believed by a factfinder, subject an employer to legal liability for discrimination." *Mandell v. County of Suffolk*, 316 F.3d 368, 373 (2d Cir. 2003). However, the plaintiff must demonstrate that the conduct occurred because of, not incidental to, the protected trait or characteristic. *See Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002). "For racist comments, slurs, and jokes to

constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997) (internal quotation marks and citations omitted). "Thus, whether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency, and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment." *Id.* at 110-11 (internal quotation marks and citations omitted), cited in *Kemp v. A & J Produce Corp.*, 164 Fed.Appx. 12, at *14, 2005 WL 3310063, at *1 (2d Cir. 2005).

After establishing that a hostile work environment resulting from discrimination existed, a plaintiff must show that there is a specific basis for imputing the discriminatory conduct to his employer. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996).

Plaintiff alleges two incidents of abusive conduct in the workplace. The first incident allegedly occurred on November 15, 1999, when Captain Blume, allegedly angry that plaintiff did not move quickly enough when ordered upstairs, placed his index finger on plaintiff's cheek and screamed, "Mother f . . . .er, who do you think you are? When I give you a f . . . ing order, you better listen boy, you f . . .ing a . . hole." Comp. ¶ 42. Captain Blume suspended plaintiff for 30 days and said to plaintiff as plaintiff changed into civilian clothes, "we got you nigger." Comp. ¶¶ 48-49. The second incident occurred when Captain Blume suspended plaintiff for 30 days immediately after his return to work from his

earlier suspension for allegedly not turning the volume down on the television quickly enough when ordered to do so. Plaintiff suffered severe chest pains as a result of the confrontation and was taken to a hospital by Emergency Medical Services. Comp. ¶ 52.

Plaintiff alleges no other incidents after 1999 or with any other supervisor that fostered a hostile work environment. Taken together, no reasonable juror could infer that these incidents were severe or pervasive enough to create a hostile work environment. Accordingly, plaintiff's claims for hostile work environment and retaliation are dismissed. [19]

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted. Plaintiff's claims under Title VII, Sections 1981 and 1983, the ADA and the Rehabilitation Act, and the NYSHRL are dismissed.

The clerk is directed to enter judgment dismissing the complaint in its entirety and to transmit a copy of the within to the parties and to the magistrate judge.

SO ORDERED.

Dated: Brooklyn, New York
July 24, 2007
By: /s/ Charles P. Sifton (electronically signed)
United States District Judge

Footnotes

1 In 1991, Congress passed the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), which, among other things, amended the Federal Aviation Act, Federal Railroad Safety Act, and Commercial Motor Vehicle Safety Act to require drug testing for transportation employees in safety sensitive positions. See Federal Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992). FOTETA requires mandatory pre-employment, reasonable suspicion, post-accident, and random drug testing of covered aviation, railway, commercial motor carrier, and mass transit transportation workers. Id. FOTETA and the Department of Transportation ("DOT") regulations promulgated pursuant to FOTETA apply to "transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents." Id; 49 C.F.R. Part 40.1.2 Plaintiff filed his original complaint in this action on April 14, 2003, naming seven defendants: the City of New York, the New York City Fire Department ("FDNY"), Dr. Kelly, three laboratories (Bendiner and Schlesinger, Quest Diagnostics Incorporated), and the Uniform Firefighters Association ("UFA"). In an order dated April 1, 2004, I dismissed plaintiff's claims with leave to replead. In addition, I dismissed FDNY as a party to the suit since FDNY lacks the capacity to be sued under New York City Charter § 396, and construed all claims against FDNY as claims against the City of New York. I dismissed with prejudice plaintiff's procedural due process claim under Section 1983 and plaintiff's

disability discrimination claims against Dr. Kelly.

Plaintiff mailed a Second Amended Complaint to all defendants on May 28, 2004. Plaintiff filed a different version of the Second Amended Complaint on June 1, 2004. On June 21, 2004, a telephone conference between all parties was conducted by Magistrate Judge Gold to address confusion on the part of the defendants as to which of the two amended complaints to answer. At that conference, Magistrate Judge Gold directed plaintiff to serve and file a Third Amended Complaint (in lieu of the two prior amended pleadings) on or before July 8, 2004.

Plaintiff served copies of the Third Amended Complaint on defendants by electronic mail on July 8, 2004, and mailed copies to all defendants on July 9, 2004. Defendant Bendiner and Schlesinger, however, apparently did not receive a copy of the complaint until July 13, 2004. Plaintiff did not file the Third Amended Complaint electronically. In addition, while a copy of the Third Amended Complaint was filed with the Clerk of Court on July 12, 2004, plaintiff failed to include the last two pages of the complaint, including the signature page. Plaintiff did not replead any claims against the UFA, nor did plaintiff replead a RICO claim in the Third Amended Complaint. Plaintiff alleged discrimination claims under Article 15 of the New York State Human Rights Law, New York Executive Law § 290.

In a Memorandum and Opinion dated November 18, 2004, I dismissed all Section 1985 claims and all claims against the three laboratories originally named as defendants. I dismissed all Section 1983 claims except

plaintiff's claims that the City deprived him of his liberty interest without due process, violated 40 C.F.R. Part 40, and violated his equal protection rights. I also dismissed all claims against Dr. Kelly except a claim arising under 42 U.S.C. § 1981.

Plaintiff's remaining claims against the City of New York arise under Title VII, Section 1983 (due process and equal protection), the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, Section 1981, and New York State Human Rights Law, New York Executive Law § 290 (age, race, and disability discrimination). Plaintiff also retains a Section 1981 claim against defendant Dr. Kelly.

3 Plaintiff has failed to comply with Local Civil Rule 56.1 since he has not submitted with his motion "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Because "[f]ailure to submit such a statement may constitute grounds for denial of the motion," id., defendants argue that plaintiff's motion should be dismissed on this ground alone. In addition, plaintiff has alleged facts elsewhere in his submissions that have not been "followed by citation to evidence which would be admissible." See Local Civil Rule 56.1(e).

Generally, courts are lenient regarding compliance with Rule 56 when the plaintiff is proceeding pro se, *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y. 2003), but in this case, plaintiff is represented by counsel. Because "[t]he preference of courts in this Circuit is for decisions on the merits," Memorandum and Opinion, Nov. 18, 2004, No. 03-1797 (CPS), p. 14, I will not deny

plaintiff's motion solely on the basis of his failure to submit a Rule 56.1 statement. Instead, in keeping with the purposes of Local Civil Rule 56.1, I will consider defendants' statement of facts as admitted. *See Spina v. Our Lady of Mercy Medical Center*, 2003 U.S. Dist. LEXIS 19091, 2003 WL 22434143, at *2 (S.D.N.Y. 2003) (considering defendant's facts admitted and pointing out that summary judgment rules, particularly Rule 56.1 "were adopted for a reason - 'to supply the court with an accurate factual record and to prohibit parties from taking misleading and unfair "shortcuts"'") (quoting *Omnipoint Communs., Inc. v. City of White Plains*, 175 F.Supp.2d 697, 700 (S.D.N.Y. 2001)); see also *Holtz v. Rockefeller and Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001); *Loucar v. Bostom Market Corporation*, 294 F.Supp.2d 472, 478 (S.D.N.Y. 2003).

4 A primary specimen is "the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system." 49 C.F.R. § 40.3. The split specimen is that "part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result." Id.

5 The DOT regulations for "safety sensitive positions" specifies a 2000 ng/mL cutoff concentration level for morphine in 49 C.F.R. § 40.87.

6 The amended complaint is unclear as to who allegedly lost the specimen. While plaintiff seems to allege on the one hand that LabCorp lost the urine specimen (Third

Amended Complaint ¶152), at the same time, plaintiff seems to allege that Susan Mills of Quest had not yet transferred the urine sample to LabCorp during the period it was allegedly lost because she had not yet received the proper authorization from FDNY. (Compl. ¶144).

7 In the letter, Anthony Winston, Associate Technical Director of Forensic Identity Testing at LabCorp stated:

It is my opinion that the insufficient quantities of DNA obtained from this sample was possibly due to the sample not being thoroughly mixed prior to being aliquoted, the small volume of urine (8mls) and the samples long term storage conditions. All could have affected the quality and quantity of DNA in this sample, but it is also possible that the sample simply did not contain sufficient cellular material to begin with. (Compl., Exh. T.)

8 A litigation package is apparently a collection of portions of the original specimen to be used in litigation when test results are in dispute. Cf. 49 C.F.R. § 40.365 (laboratory falsification, concealment or destruction of "documentation concerning any part of the drug testing process, including, but not limited to, documents in a 'litigation package'" are examples of serious noncompliance).

9 The letter was dated March 4, 2003, postage meter stamped March 15, 2003, and post marked March 18, 2003.

10 Plaintiff asserts claims of racial discrimination under

Title VII and Section 1981 with respect to his signing the Stipulation and Agreement, subsequent suspensions, failure to receive medical leave, and wrongful termination. See Memorandum and Opinion, Nov. 19, 2004, No. 03-CV-1797 (CPS), p. 47; see also Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 10 ("Mr. Thomas alleges in the EEOC Complaint that the defendant, NYFD, engaged in impermissible retaliation in violation of Title VII which resulted in suspension on more than one occasion and ultimately in termination of his employment.")

Plaintiff also asserts claims of hostile work environment and retaliation under Title VII and Section 1981 in connection with the allegedly degrading treatment inflicted on plaintiff by Captain Blume. See Compl. ¶ 15 ("That the workplace was hostile and the hostility was in retaliation for plaintiff's filing an EEOC Charge of Discrimination sworn to on January 24, 2000 in which plaintiff alleged racially motivated discrimination.") and ¶ 53 (stating "[t]hat Captain Blume subjected plaintiff to disparate degrading, humiliating and embarrassing treatment as set forth above" and that these acts were Title VII and Section 1981 violations).

11 Plaintiff's remaining Section 1983 claims are: (1) that the City deprived him of his liberty interest without due process, (2) that the City violated 40 C.F.R. Part 40 by publicizing his suspension from duty for the use of a controlled substance, and (3) that the City violated his equal protection rights by applying standards to his drug tests that were more strict than those applied to other employees in safety-sensitive positions.

12 Plaintiff alleges that he was discharged because of

his disability, which he describes as his mixed anxiety and depressive disorders, for which his psychiatrist was prescribing Zoloft. See Memorandum and Opinion, Apr. 1, 2004, No. 03-CV-1797 (CPS), pp. 48-53.

13 Section 296(a) of the New York Executive Law defines employment discrimination based on the "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual" as unlawful, and § 296(e) forbids retaliation against employees who have complained of or opposed discriminatory practices.

In the November 14, 2004 decision, I dismissed plaintiff's state law claims of racial discrimination in connection with the suspensions imposed by Captain Blume, Captain Blume's harassment, and the Fire Department's denial of medical leave as time-barred. See Memorandum and Opinion, No. 03-CV-1797 (CPS), Nov. 19, 2004, p. 47. I did not dismiss plaintiff's state law claim in connection with his assertion that the Stipulation and Agreement itself was discriminatory because it imposed harsher conditions than allegedly similar agreements between the Fire Department and other firefighters. I determined that that claim was not time-barred because the date of accrual occurred "when [plaintiff] knew or had reason to know the allegedly discriminatory motive," id. at 50, which was after July 21, 1999, the date he entered the Stipulation and Agreement. Id.

14 In plaintiff's subsequent Third Amended Complaint, plaintiff asserts new allegations with respect to the Stipulation. Plaintiff asserts that "the Deputy

Commissioner of Legal Affairs forced plaintiff to sign a Stipulation Agreement by asserting that plaintiff would be fired if he failed to sign." Complaint ¶ 27. Plaintiff also alleges that he signed the Stipulation "without the benefit of legal representation" and "while under a doctor's care and treatment and while under the influence of Zoloft, a prescribed antidepressant." Complaint ¶¶ 31-32.

In my November 19, 2004 decision, I reaffirmed my decision dismissing with prejudice plaintiff's procedural due process claims, relying on the law of the case doctrine, which "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Memorandum and Opinion, No. 03-CV-1797 (CPS), Nov. 19, 2004, p. 27 (citing *DiLaura, et. al. v. Power Authority of the State of New York*, 982 F.2d 73, 76 (2d Cir. 1992); *In re PCH Assoc.*, 949 F.2d 585, 592 (2d Cir. 1991). The doctrine is discretionary, though the Second Circuit has noted that "the major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992). Because no such ground existed, I did not reconsider plaintiff's procedural due process claim.

[15] Plaintiff stated in his deposition that when he signed the Stipulation,

> I waived all my civil rights and all my constitutional rights . . . I had no rights to appeal. I had no rights to go to court. I had no

> rights - well, I waived the right to appeal, waived the right to go to court, waived the right to the disability act and a number of other different things that were waived. And these are all the things that are given to you by the Constitution of the United States that was stripped from me by the fire department when they forced me to sign the stipulation . . . .

Defendants' Exhibit BB, Deposition Testimony of Claude Thomas, 12:15-16 and 13:3-11.

16 These claims are not covered by the terms of the Stipulation and Agreement, which are limited to claims arising from plaintiff's agreement to submit to random drug testing procedures and to avoid other criminal misconduct.

17 In any event, since plaintiff "provides no argument" concerning his federal disability claims, his age and disability discrimination claims under the New York State Human Rights Law, or his claim against Dr. Kelly, those claims are considered abandoned. *See Blouin v. Spitzer*, 356 F.3d 348, 363 n. 9 (2d Cir. 2004) (deeming plaintiff's claims abandoned because "[a]lthough mentioning [those] claims, [plaintiff] provides no argument concerning them") (citing *Taylor v. Rodriguez*, 238 F.3d 188, 196-97 (2d Cir. 2001)); *Lipton v. County of Orange*, 315 F.Supp.2d 434, 446 (S.D.N.Y. 2005) ("This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

18 "[M]ost of the core substantive standards that apply

to claims of discriminatory conduct in violation of Title VII are also applicable to claims of discrimination in employment in violation of § 1981 and the Equal Protection Clause." *Tilghman v. Waterbury Bd. of Educ.*, 154 Fed.Appx. 221, 223 (2d Cir. 2005) (citations omitted). Accordingly, plaintiff's claims of hostile work environment and retaliation under Title VII and Section 1981 are considered together.

19 With respect to plaintiff's retaliation claim, plaintiff asserts that the allegedly hostile work environment "was in retaliation for plaintiff's filing an EEOC Charge of Discrimination sworn to on January 24, 2000 in which plaintiff alleged racially motivated discrimination." Compl. ¶ 15. Because there was no hostile work environment claim, the retaliation claim fails, but, in any event, this claim must be dismissed simply because the allegedly hostile work environment, namely Captain Blume's mistreatment of plaintiff in late 1999, occurred before plaintiff filed the EEOC claim which allegedly prompted the retaliation.

Filed 11/19/2004
CV-03-1797 (CPS)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Claude Thomas,
Plaintiff,

- against -

The City of New York, Bendiner and Schlesinger, Quest Diagnostics Incorporated, Laboratory Corporation of America Holdings, and Kerry Kelly, M.D.,
Defendants.

SIFTON, Senior Judge.

Plaintiff Claude Thomas brings this amended civil rights action against Bendiner and Schlesinger, Quest Diagnostics Incorporated, Laboratory Corporation of America Holdings, the City of New York and Kerry Kelly, M.D. accusing them of conspiring to deprive him of rights under the Department of Transportation[1] drug testing regulations based on his race, violating his due process and equal protection rights, and discriminating against him on the basis of disability. The plaintiff also brings Title VII claims of race discrimination and retaliation against the City of New York. The litigation arises out of the New York City Fire Department's termination of plaintiff's employment based on a urinalysis that detected a controlled substance.

On April, 1, 2004, the Court issued a Memorandum and

Order ("April 1 order") dismissing the plaintiff's original complaint against all defendants, with leave to replead certain claims.[2] The Court further directed that any amended pleading address the deficiencies outlined in the order, comply with Rule 11 of the Federal Rules of Civil. Procedure and be filed within 45 days of the Order. Pursuant to the Order, plaintiff filed a Third Amended Complaint (hereinafter "Complaint"), which defendants now move to dismiss.

Defendants Quest Diagnostics Incorporated ("Quest"), Bendiner and Schlesinger ("B&S"), and Laboratory Corporation of America ("LabCorp") together the "laboratory defendants" move to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and also on the grounds that the complaint is untimely and unsigned, in violation of Rule 11(a) of the Federal Rules of Civil Procedure. Defendants City of New York and Dr. Kerry Kelly (together the "municipal defendants") move to dismiss all plaintiff's claims except for the Title VII claims of race discrimination and retaliation.[3] The municipal defendants move for dismissal pursuant to Rule 12(b)(6) for failure to state to claim and on the grounds that certain claims against the municipal. defendants are time-barred.

For the following reasons, the motions are granted in part and denied in part.

BACKGROUND

The facts of this case are more fully set forth in the April 1, 2004 Memorandum and Order of this Court,

familiarity with which is presumed. A brief summary of the facts follows.

Plaintiff, an African-American male, joined the New York City Fire Department on November 12, 1989 as a Firefighter First Grade. On July 21, 1999, plaintiff signed a stipulation and Agreement ("Stipulation") with the FDNY in which plaintiff admitted the use of a controlled substance on May 24, 1999, leaving the scene of an accident on June 7, 1999, and violating the FDNY's oath of office. The Stipulation provided that plaintiff would be subject to frequent random testing for controlled substances.

Subsequent to signing the Stipulation, plaintiff says he was subject to verbal abuse from commanding officers in the presence of co-workers and others. One such incident is said to have occurred on November 15, 1999. A Captain Blume is said to have yelled at plaintiff, using expletives, for not moving quickly enough when ordered upstairs. In the presence of a Bureau of Investigation and Trials ("BIT") officer, Captain Bloom allegedly "placed his index finger on plaintiff's cheek and screamed in plaintiff's face "Mother f.... r, who do you think you are? When I give you a f...ing order, you better listen boy, you f...ing a..hole." (Comp. Par. 42.) Captain Blume suspended plaintiff for 30 days without pay and is said to have told plaintiff as plaintiff was changing into civilian clothes, "we got you nigger." (Comp. Pars. 48-49).

Plaintiff returned to the firehouse from his suspension on December 17, 1999 and was immediately suspended far another 80 days by Captain Blume for allegedly not turning the volume down on the television quickly

enough when ordered to do so. Plaintiff, suffering severe chest pains as a result of the confrontation, was removed from the fire house by Emergency Medical services. Plaintiff was, at the time, taking anti-depressant medication and was being treated by Dr. Richard G. Dudley, Jr., a psychiatrist, for job-related stress. Dr. Dudley subsequently submitted a letter to the FDNY, dated February 14, 2000, requesting medical leave on behalf of plaintiff, which was denied. Dr. Dudley renewed the request by letter dated March 7, 2000, which was again denied. On January 4, 2000 plaintiff filed a complaint with the Equal Employment Opportunity commission ("EEOC").

Plaintiff's urine was tested for drugs approximately 29 tines between July 21, 1999 and October 24, 2002, with negative results each time. Generally, the urine specimens were split into two, a "primary" specimen and a "split" specimen.[4]Pursuant to a contractual agreement with the FDNY, plaintiff's October 24, 2002 urine sample, like all the previous samples, was first tested by defendant B&S. The October 24, 2002 urine specimen tested positive for morphine at 1353 ng/mL. The FDNY specifies a 300 nglmL cutoff level for opiates, including morphine.[5] As a result of the positive report, plaintiff was ordered to "stand down" on November 4, 2002 - meaning that he was restricted from driving department vehicles and treating patients.

On November 5, 2002, plaintiff submitted a hair follicle and urine sample to his treating physician, Dr. Dudley, testing. According to Dr. Dudley's letter to the FDNY, a hair drug screen can determine if a person ingested opiates at any point in time over a period from weeks to

years prior to the sample being taken. (Comp. Ex. H.) The samples were tested by Quest, a laboratory on the FDNY's list of approved laboratories. The urine tested negative, and according to Dr. Dudley, the hair follicle test was also negative for opiates. (Comp. Ex. H.) Dr. Dudley reported the results to the FDNY on November 14, 2002.

By letter dated November 14, 2002, plaintiff was informed by the FDNY that as a result of the October 24, 2000 positive result and pursuant to the stipulation, he had seven days to submit a re-test request and present relevant evidence on his behalf before the FDNY took final action. The letter also indicated that failure to provide "satisfactory and acceptable mitigation" would result in plaintiff's termination on November 21, 2002. (Comp. Ex. D.)

On November 11, 2002, plaintiff submitted another urine sample to a BIT Lieutenant at the Bureau of Health Services, but never received the results from its testing.

On November 14, plaintiff paid a $108 fee to have his October 24, 2002 specimen re-tested. In a letter dated November 13, 2002 to Quest, Dr. Kelly, the FDNY Chief Medical Review Officer, also requested a re-test of plaintiff's specimen for a confirmation of morphine. At an unknown date, Assistant Commissioner James Drury, on behalf of BIT, sent a urine specimen, attributed to plaintiff, to Quest for a re-test. The request was copied to B&S. A third letter, also undated and attached to a specimen, was sent from B&S to Quest requesting plaintiff's urine be re-tested for morphine. Which specimen each request relates to

and what became of both the primary specimen and the split specimen from B&S is not clear.

Plaintiff alleges that the primary specimen of plaintiff's urine was removed from frozen storage at B&S on November 22, 2002, but it was not sent to Quest for re-testing until three days later on November 25, 2002. Plaintiff alleges that B&S failed to properly refrigerate the specimen in this interval. (Compl. at 91). The specimen was not received by Quest until December 2, 2003. Plaintiff alleges that the specimen container was broken and not intact upon arrival at Quest. (Compl. at 93). According to plaintiff's complaint, a December 3, 2002 report from Quest indicates the test revealed morphine levels of 200 ng/mL, below both the FDNY and DOT cutoff levels. On November 13, 2002, plaintiff was suspended for 30 days because of the initial positive morphine test of his October 4, 2002 urine specimen. On November 15, 2002, the New York Fire Department published plaintiff's suspension for violating sections of the Regulations for the Uniformed Force governing the use of controlled substances and the oath of office. By letter dated December 4, 2002, plaintiff was notified that he was terminated, effective December 14, 2002. Immediately upon the notification of his suspension and again upon the notification of his termination, plaintiff, denying the use of any controlled substance other than Zoloft, contacted Robert Straub, the Bronx Trustee of the UFA, requesting that he file a grievance on plaintiff's behalf. Plaintiff alleges that no grievance was filed.

On December 24, 2002, plaintiff advised Deputy Commissioner Clinton that he wanted the urine specimens from B&S and Quest to be re-tested to

confirm the existence of morphine and for DNA testing. On December 31, 2002, plaintiff executed an authorization for the transfer of specimens from Quest to LabCorp, also on the FDNY list of approved laboratories. On January 2, 2003, plaintiff paid $1500 to LabCorp for the tests. However, on the same date, plaintiff was advised by Susan Mills of Quest that the specimen would not be transferred without FDNY authorization. On January 6, 2003 Quest obtained a mouth swab from plaintiff in Queens for the purpose of matching DNA traits which was to be transported to LabCorp. (Compl at Par. 142). On January 27, 2003, LabCorp reported that it had not received the test. Apparently the specimen was shipped from Quest without being addressed to the appropriate department or recipient at LabCorp. The specimen was apparently found on January 31, 2003.[6] Plaintiff was then informed that Ms. Mills, acting under instructions from the FDNY, only authorized test for a morphine confirmation, not a DNA test. On February 6, 2003, Dr. Kelly transmitted a letter to LabCorp authorizing the DNA testing. Plaintiff was then required to pay an additional $90 fee to LabCorp. LabCorp did not report its findings with respect to the morphine test, but by letter dated March 10, 2003, LabCorp reported to plaintiff that there were insufficient quantities of DNA in the sample to develop a profile.[7]

Prior to the testing by LabCorp, plaintiff requested a so-called "Litigation Package" from B&S.[8] Plaintiff made the request in writing through his attorney on both December 24, 2002 and January 30, 2003. Receiving no response, plaintiff requested the assistance of Deputy Commissioner Clinton in a letter dated February 26, 2003, and submitted another letter

request to B&S on that same date. By letter dated on March 6, 2003, plaintiff, through his attorney, again requested the Deputy Commissioner's assistance in obtaining a Litigation Package from B&S. Eventually, in late March, plaintiff received a letter from William Closson, Director of Forensic Toxicology, indicating that he was prohibited by law from releasing the Litigation Package to anyone other than the "ordering client/physician." [9] (Comp. Ex. M.) Plaintiff allegedly did not receive a Litigation Package from B&S, but one was received from Quest on April 1, 2003 after two previous requests in December 2002 and January 2003.

On April 14, 2003, plaintiff filed his original complaint setting forth the following claims for relief; (1) pursuant to 42 U.S.C. § 1985(3), conspiracy to contravene the requirements of 49 C.F.R. Part 40 relating to drug testing; pursuant to 42 U.S.C. § 1983, deprivation of plaintiff's procedural due process and equal protection rights and violations of 49 C.F.R. Part 40; (3) pursuant to 18 U.S.C. § 1964(c), violation of 18 U.S.C. § 1962(a), the racketeering statute, by testing and re-testing plaintiff's urine specimen and falsely reporting positive results; (4) pursuant to 29 U.S.C.§ 794{a}(2), violation of 29 U.S.C. § 794 by causing plaintiff's discharge because of his disability.[10] On April 1, 2004, in response to defendants' motions to dismiss, the Court dismissed the complaint against all defendants except for plaintiff's disability claims against the City of New York. The Court granted plaintiff leave to replead all dismissed claims except plaintiff's 42 U.S.C. § 1988 procedural due process claim and plaintiff's claim of disability discrimination against Dr. Kelly, which were both dismissed with prejudice. Plaintiff was instructed to file an amended complaint within forty-five days of the

Court's decision.

Plaintiff mailed a Second Amended Complaint to all defendants on or about May 28, 2004.[11] Plaintiff filed a Second Amended Complaint on June 1, 2004. On June 21, 2004, a telephone conference between all parties was held before Magistrate Judge Gold in order to address confusion on the part of the defendants as to which of the two amended complaints to answer. Magistrate Judge Gold directed plaintiff to serve and file a Third Amended Complaint (in lieu of the two prior amended pleadings) on or before July 8, 2004. (Gold Tr. at 15). Plaintiff served copies of the Third Amended Complaint on defendants by electronic e-mail on July 8, 2004, and mailed hard copies to all defendants an July 9, 2004; defendant B&S, however, apparently did not receive a copy of the complaint until July 13, 2004. The plaintiff did not file the Third Amended Complaint electronically. In addition, while a hard copy of the Third Amended Complaint was filed with the Clerk of Court on July 12, 2004, the plaintiff failed to include the last two pages of the complaint, including the signature page.

In the Third Amended Complaint ("Complaint"), plaintiff reasserts claims pursuant to 42 U.S.C. §1985 and 1983 against all named defendants. Plaintiff also re alleges that municipal defendants violated the American with Disabilities Act ("ADA"), 42 U.S.C. §12101. et. seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. §794. Finally, plaintiff brings new claims of employment discrimination on the basis of race and retaliation against the City of New York in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., 42 U.S.C. §1981, and Article 15 of the

New York State Human Rights Law, New York Executive Law § 294 ("SHRL").[12]

Plaintiff seeks reinstatement of his position, a permanent injunction ordering the City of New York to restore all benefits lost as a result of termination and to refrain from further retaliatory acts, and 25 million in compensatory damages from defendant city of New York. Plaintiff seeks 25 million in compensatory damages and treble damages from the three laboratory defendants and Dr. Kelly. Plaintiff also seeks court costs and attorney's fees.

DISCUSSION

Jurisdiction

This court has jurisdiction over this action under 28 U.S.C. § 1331, which grants district courts jurisdiction over civil actions arising under federal law, 28 U.S.C. § 1343, which authorizes jurisdiction over actions arising under 42 U.S.C. 1983, and principles of pendant jurisdiction to the extent the complaint can be read to allege a claim under state law.

Motion to Dismiss for Untimely and Unsigned Pleading

Laboratory defendants move to dismiss plaintiff's amended complaint a untimely and unsigned, in violation of Rule 11(a) of the Federal Rules of Civil Procedure. I find that the timeliness concerns do not warrant the court's attention, for the alleged delay was a matter of days and the defendants have not experienced any prejudice as a result of the delay. However, defendants' allegation that the pleading was

unsigned has not been disputed or explained by the plaintiff. Rule 11(a) of the Federal Rules of Civil Procedure provides in relevant part as follows;

> (a) Every pleading, written motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, shall be signed by the party-an unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

F.C.R.P. Rule 11(a) ; see also Daniel v. Safir, 135 F.Supp.2d 367,379 (E.D.N.Y.2001).

In this ease, Quest, the first defendant to file response papers, filed papers in support of its motion to dismiss the Third Amended Complaint on September 17, 2004, which called attention to plaintiff's omission of signature. However, plaintiff did not promptly correct the error by electronically or otherwise filing a signed copy of the amended complaint. In addition, the plaintiff failed to include the last two pages, including the signature page, of the Third Amended Complaint that he filed with the Court.

While courts are generally lenient in this regard when the plaintiff is proceeding pro se, Dean v. Westchester Country P.R.C., 309 F. Supp. 2d 587, 596 (S.D.N.Y 2004), in this case,the plaintiff is represented by counsel. However, dismissal in such circumstances would be an extraordinary remedy. The preference of courts in this Circuit is for decisions on the merits. Defendants do not appear to have been prejudiced in

any way by plaintiff's omission. The mistake has since been corrected. Accordingly, I will not dismiss the pleading on this ground.

Motion to Dismiss for Failure to State a Claim

Defendants also seek dismissal for failure to state a claim upon which relief can be granted. In considering a motion pursuant to Rule 12(b)(6), the court should construe the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers v. Time Warner, Inc., 282 F.3d 147, (2d Cir.2002)(citing Gregory v. Daly, 243 F.3d 687, 691 Cir. 2001)), although "mere conclusions of law or unwarranted deductions" need not be accepted. First Nationwide Bank v. Helt Funding Corp. 27 F. 3d 763, 771 (2d Cir.1994) "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F. 3d 375,378 Cir.1995). The Court is permitted to take into account the contents of documents attached to or incorporated in the complaint. Colmas v. Harsett, 886 F.2d 8, 13 (2d Cir.1989). Dismissal is appropriate when it "appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir.2000).

Section 1985 Violations

Although plaintiff does not specify a particular subsection of Section 1985 in his complaint, for reasons more fully discussed in the April 1 Order, plaintiff's claim will be treated as a claim pursuant to Section

1985(3). Section 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... the party so injured or depraved may have an action far the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

The Federal Rules of Civil Procedure set forth a liberal pleading standard. Generally, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The purpose of the complaint is merely to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Leatherman, 507 U.S. at 168; Conley v. Gibson, 355 U.S. 41, 47 (1957). Although the Second Circuit had previously adopted heightened pleading requirements in actions alleging a conspiracy to violate civil rights and required fact pleading in such cases, Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981), see also White v. Frank, 680 F. Supp. 629, 639 (S. D.N.Y. 1988), the Supreme Court has since rejected a heightened pleading standard for civil actions unless a stricter pleading standard is required by statute. See Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 513 (2002) (noting that "with limited exceptions" for example, when the Federal Rules require pleading with

greater particularly, as with averments of fraud or mistake under 9(b)-"Rule 8(a)'s simplified pleading standard applies to all civil actions."); see also Straker v. Metropolitan Transit Authority, 333 F. Supp.2d 91, 99 (S.D.N.Y. 2004).

Although Swierkiewicz rejected a heightened pleading standard for civil actions, it did not specifically address the standard for assessing claims that assert conclusory allegations unaccompanied by factual. support. Straker, 33 F. Supp.2d at 99. Given that the Second Circuit has consistently held that conclusory allegations are subject to dismissal under Rule 12(b)(6), I will apply this standard in addressing the present motion.[13] See, e.g. Polur v. Raffe, 912 F.2d 52, 56 (2d Cir.1990)(noting that "it is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal, of a claim predicated on a conspiracy to deprive him of his constitutional rights."); Yursuf v. Vassar College, 35 F.3d 709, 713 (2d. Cir. 1994)("A complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts fails to state a claim under 12(b)(6)") ; Smith v. Local 819 I. B. T. Pension Plan, 291 F.3d 236, 240 (2d Cir.2002) (holding in an ERISA case that conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.")

To state a claim for relief under Section 1985(3), a plaintiff must allege four elements: (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal. protection of the laws or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to

the plaintiff's person or property or a deprivation of a right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999) ; Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F. 3d 1085, 1087 (2d Cir. 1993) (citing United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983).

With respect to the first element of a claim under Section 1985(3), a plaintiff "must provide some factual, basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003); Romer v. Morgenthau 119 F.Supp.2d 345, 363 (S.D.N.Y. 2000). With respect to the second element, plaintiff must allege that "the defendants have, with racial or other class-based discriminatory animus, conspired to deprive [him] of a constitutional or other federal right. Soto v. Schembri, 960 F. Supp. 751, 760 (S.D.N.Y. 1997) (citing LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 426-27 (2d Cir. 1995); see Thomas, 165 F.3d at 146; Mian, 7 F.3d at 1088; Local 610, 463 U.S. at 829. Section 1985(3) provides no substantive rights itself; rather, it merely provides a remedy for violation of the rights it designates. Great Am. Fed. Sav. Loan Assoc. v. Novotny, 422 U.S. 366, 372 (1979). "As a result, to maintain a claim pursuant to § 1985(3), there must be some predicate constitutional right which the alleged conspiracy violates." Friends of Falun Gong v. Pacific Cultural Enterprise, Inc., 288 F. Supp.2d 273, 279 376; Emanuel v. Barry, 724 F. Supp. 1096, 1100 (F.D.N.Y. 1989)).

Here, as was the case in the original complaint, plaintiff has not identified the constitutional right or federal statutory right of which defendants allegedly conspired to deprive him. In the preliminary statement of the complaint, plaintiff asserts that defendants conspired to "deprive plaintiff of his constitutional rights...[and] acted with class based discriminatory animus...and plaintiff was deprived of his employment for which he was qualified..." (Compl. at 16). In the fact section of the complaint, plaintiff alleges that defendants City of New York, B&S and Quest (LabCorp is not mentioned) "conspired to deprive him of his confidentiality accorded by federal statute,[14] equal protection of the law, to deprive him of employment and the ability to support himself and his family at employment for which he was qualified." (Compl. at 99). Plaintiff also alleges that defendants FDNY, B&S and Quest (again, LabCorp is not mentioned) "conspired to lower the cut--off concentration so as to incorporate false positives that would be triggered by certain food consumption." (Compl. at 115).

In the April 1 order, I interpreted plaintiff's §1985(3) claim to be an alleged conspiracy to contravene the drug testing rules under 49 C.F.R. Part 40, for which there is no private right of action, express or implied. Parry v. Mohawk Motors of Michigan, Inc. , 236 F.3d 299, 308-09 (6th Cir. 2000) (no implied private cause of action under 49 C.F.R. Part 40) ; Drake v. Delta Air Lines, Inc., 147 F. 3d 169, 170-71 (2d Cir. 1998)(affirming district court's dismissal of plaintiff's claim that defendant violated federal drug testing regulations because there is no implied right of action) ; Schmeling v. NORDAM, 97 F. 3d. 1336, 1844 (10th Cir. 1996) (no private right of action to enforce 49 C.F.R. § 40.35) ;

Abate v. Southern Pac. Transp. Co., 928 F.2d 167, 168 (5th Cir. 1991) (no implied private cause of action under 49 C.F.R. Part 40); Hall v. United Labs, Inc., 31 F.Supp.2d 1039, 1042 (N.D. Ohio 1998) (no private right of action to enforce 49 C.F.R. § 40.33). Rather, Congress expressly provided for enforcement of DOT drug testing regulations through an administrative mechanism. See Hall, 31 F. Supp.2d at 1042; Enforcement Considerations, 54 Fed. Reg. 49864, 49865 (December 1, 1989). Moreover, I held that in any case, plaintiff did not meet the second requirement for a conspiracy claim, because he had failed to allege facts sufficient to give rise to the inference that defendants adopted a policy for drug testing that differs from 49 C.F.R. Part 40 because of racial animus, or that they applied stricter standards to his specimen because of his race. Consequently, I dismissed plaintiff's Section 1985 conspiracy claims with leave to replead.

I find that plaintiff's amended complaint suffers from the same deficiencies. Again, plaintiff's § 1985(3) claim appears to be an alleged conspiracy to violate the drug testing rules under 49 C.F.R. Part 40, for which there is no private right of action. Moreover, an essential element of a Section 1985 claim for relief is the requirement that the alleged discrimination took place because of plaintiff's race. Mian, F.3d at 1088. Plaintiff's amended complaint does not allege that LabCorp even knew that plaintiff was African American or that LabCorp acted on the basis of racial animus. Consequently, plaintiff's § 1985(3) claim with respect to defendant LabCorp is dismissed. Moreover, although it can be inferred from the alleged facts that Dr. Kelly knew of plaintiff's race, the plaintiff does not allege in the amended complaint, nor can it be inferred from the

facts, that Dr. Kelly's acted on the basis of racial animus. Accordingly, plaintiff 1985(3) claim with respect to defendant Dr. Kelly is dismissed.

Although plaintiff alleges that the remaining defendants-FDNY, Quest and B&S-conspired to violate federal drug testing regulations "on the basis of racial animus" (Compl. at 112), viewing the allegations of the amended complaint as liberally as possible, plaintiff has failed to allege facts which would give rise to such an inference of racial animus except with regard to FDNY (i.e. City of New York). Plaintiff alleges several facts, such as derogatory comments about plaintiff's race made by a fire department supervisor, which would support a finding that the defendant City of New York acted on the basis of racial animus. However, with respect to B&S and Quest, the plaintiff offers only conclusory allegations that the defendants acted on the basis of racial animus. While a heightened pleading standard is not required to allege a claim under 1985(3), "the mere assertion of racial motivation. . .is not sufficient to state a conspiracy claim." Posr v. Court Officer Shield, 180 F.3d 409, 419 (2d Cir. 1999) (internal citation omitted). Because a conspiracy requires a "meeting of the minds" between two or more defendants, and in this case, plaintiff has alleged facts sufficient to give rise to an inference of racial animus only as to one defendant, plaintiff's Section 1985 claims are dismissed.

Section 1983 Claims

Interpreting plaintiff's complaint liberally, he appears to be asserting three claims under Section 1983 - a due process claim, an equal protection claim and a claim to

enforce procedural and other rights created by 49 C.F.R. Part 40. For reasons fully discussed in the April 1 order, I dismissed with prejudice the plaintiff's procedural due process claim that he was deprived of his employment without a hearing and gave leave for plaintiff to replead the claims with respect to equal protection and 49 C.F.R Part 40.

Section 1983 of 42 U.S.C. provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. In order to prevail on a Section 1983 claim, plaintiff must establish two elements. First, plaintiff must show that defendants acted under color of state law. For reasons discussed in the April 1 order, I held it was reasonable to infer that plaintiff has satisfied this requirement with respect to all defendants.[15] Second, plaintiff must show that defendants deprived him of a right secured by the Constitution or laws of the United States. Plaintiff's claims are reviewed in turn.

Procedural Due Process

"The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without

due process of law." Meachum v. Fano, 427 U.S. 215, 223 (1976). In order to maintain a procedural due process claim, the plaintiff must "first identify a property right, second show that the state deprived him of that right, and third show that the deprivation was effected without due process." Local 342, L.I. Pub. Serv. Employees v. Town Bd. Of Huntington, 31 F. 3d 1191, 1194 (2d Cir. 1994) (emphasis in original), citing Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990) (per curiam).

For the reasons discussed in the April 1 Order, I found that plaintiff's complaint satisfied the first two elements of a claim for deprivation of procedural due process. However, I found that plaintiff failed to satisfy the third element, as he waived his right to a hearing both before and after termination for violating the Stipulation and Agreement, which was signed by plaintiff on July 21, 1999. Paragraph 10 of the Stipulation states that "the finding of the presence of alcohol, marijuana or any other controlled substance in [plaintiff's] blood or urine will be deemed to be a violation of this agreement." (Comp. Ex. A Par. 10).

Paragraph 14 of the Stipulation states:

> That Firefighter Thomas understands that, for the entire duration of his employment with the Department, in the event of any violation of this agreement ... from the date of this stipulation, he will be terminated without a hearing of any kind, and Firefighter [Thomas] hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules and any applicable

collective bargaining agreement.

(Comp. Ex. B 9 Par. 14.)[16]

Moreover, paragraph 22 of the Stipulation states that the agreement has been "entered into knowingly, intentionally, without coercion, duress or undue influence...and has been accepted by Firefighter Thomas after having had discussion with, and having been advised thereon by his counsel." (Comp. Ex. A Par. 22) It is well settled that a public employee may waive his procedural due process protections. Miller v. Coughlin, 59 N.Y.2d 490, 494 (1983) ; Abramovich v. Board of Educ., 46 N.Y.2d 450, 453, 455-57 (1979) ; Morrisroe v. Safir, 1998 WL 709822, 2 (S.D.N.Y. Oct. 9, 1998). This is particularly so when the waiver is "freely, knowingly and openly arrived at, without taint of coercion or duress." Montiel, 538 N.Y.S.2d at 4 (internal citations omitted). "A party may by contract waive his right to resort to the courts, but he will only be held to have done so if the waiver is explicit." Hartnett, 504 N.Y.S.2d at 572. In addition, the New York State Court of Appeals in Abramovich explained that the waiver is valid where it "serves as the quad pro quo for countervailing benefits." Aabramovich, 46 N.Y.2d at 455. An employee may waive his right to procedural due process protections in those instances in which the waiver is predicated "upon the existence of a bona fide agreement by which the employee received a desired benefit in return for the waiver ..." Matter of American Broadcasting Companies v. Roberts, 61 N.YS. 2d 244, 249-50 (1984).

Because plaintiff explicitly waived has right to a pre and/or post-termination hearing, and in the original

complaint, made no allegations that he signed the Stipulation under duress, coercion or without knowledge of the consequences, I dismissed plaintiff's procedural due process claim with prejudice. In the amended complaint, plaintiff reasserts this claim and adds new allegations in support of this claim.[17] Relying on the "law of the case" doctrine, I will not reconsider my previous decision regarding dismissal of this claim.

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." DiLaura, et. al. v. Power Authority of the State of New York, 982 F.2d 73, 76 (2d Cir. 1992) ; Liana Corp. v. PCH Assocs. (In Re PCH Assocs.), 949 F.2d 555,592 (2d Cir.1991). Although the doctrine is "admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to a final judgment," Virgin Atl. Airways v. National Mediation Bd., 955 F.2d 1245, 1255 (2d Cir.), cert. denied, 505 U.S. 820 (1992), the Second Circuit has noted that "the major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Id., at 1255; see also DiLaura, 982 F. 2d at 76. Because no such ground is present in this case, the law of the case doctrine applies, and I will not reconsider plaintiff's procedural due process.

However, in addition to asserting this previously dismissed claim that he was deprived of a constitutionally protected property interest without a hearing, the plaintiff in his amended complaint also seems to be asserting the claim that the city of New York deprived him of a constitutionally-protected

liberty interest without due process by publicizing his suspension from duty not for the "alleged use" but for the "Use of a controlled Substance." (Compl. at 101). Plaintiff alleges that this publication "exposed him to ridicule, scorn and derision among his colleagues." (compl. at 102).

A person's interest in his or her good reputation alone, apart from a more tangible interest, is not a liberty or property interest sufficient to invoke the procedural. protections of the Due Process clause or create a cause of action under §1983. See Patterson v. City of Utica, 370 F.3d 322, 329-30 (2d cir. 2004) ; Paul v. Davis, 424 U.S. 693 (1976) Instead when dealing with loss of reputation alone, a state law defamation action for damages is the appropriate means of vindicating that loss. Patterson, 370 F.3d at 330; Davis, 424 U.S. at 701-02. Loss of one's reputation can, however, invoke the protections of the Due Process clause if that loss is coupled with a deprivation. of a more tangible interest, such as government employment. Bd. Of Regents v. Roth, 408 U.S. 564, 572-3 (1972). For a government employee, a cause of action under §1953 for depravation of a liberty interest without due process of law may arise when an alleged government defamation occurs in the course of dismissal from government employment. Patterson, 370 F . 3d at 30; Roth, 408 U.S. at 573. This claim is commonly referred to as a "stigma plus claim. Id.

To succeed on a stigma-plus claim arising from termination of employment, the plaintiff must show first that the government made stigmatizing statements about him, i.e. statements that call into question plaintiff's "good name, reputation, honor or

integrity." Quinn v. Syracuse Model Neighborhood Corp. 513 F.2d 438, 446 (2d cir. 1980); Patterson, 370 F.3d at 330. A plaintiff generally is required "only to raise the falsity of these stigmatizing statement as an issue, not prove they are false." Patterson, 370 F.3d at 330. Second, a plaintiff must prove these stigmatizing statements were made in public. Abramson v. Pataki, 278 F.3d 93, 101-02 (2d. Cir.2002). Third, plaintiff must show the stigmatizing statement were made concurrently in time to plaintiff's dismissal from government employment. Patterson, 370 F.3d at 330. If a plaintiff successfully proves his stigma-plus claim, due process requires that as a remedy he be given a post-deprivation opportunity to clear his name. Roth, 408 U.S. at 573.

Liberally drawing all inferences in plaintiff's favor, plaintiff has alleged facts sufficient to give rise to the inference that the requirements of a stigma-plus claim are met. It can be reasonably inferred that statements that plaintiff used a controlled substance call into question his good name, honor, reputation and integrity. Also, although it is not entirely clear to whom this fire department publication was circulated, at this early stage in the litigation it can be inferred that it satisfies the publication prong of a stigma plus claim. Finally, while the publication was made on November 15, 2002, concurrently with plaintiff's suspension date and not his December 12, 2002 termination date, it can be inferred that the 30-day suspension which led into a termination is a "significant alteration of plaintiff's employment status," which satisfies the third requirement of a stigma-plus claim. See Ulrich v. City and County of San Fransisco, 308 F.3d 968, 983 (9th Cir.2002) (stating that there is no requirement of a

strict temporal link between stigmatizing statements and discharge; instead requirement is that stigmatizing statement be "so closely related to discharge that the discharge itself may became stigmatizing in the public eye.") Consequently, plaintiff's Sec.1983 due process claim against the City of New York based on deprivation of liberty interest without due process is not dismissed, and City of New York's motion to dismiss this claim is denied.

Equal Protection

I interpret plaintiff's complaint to allege that defendants treated him, as an employee of the FDNY, differently than other safety sensitive employees whose drug samples are tested under the more lenient DOT standards outlined in 49 C.F.R. Part 40. Far the reasons discussed in the April 1 Order, I found that the stricter standard utilized by FDNY for drug testing of its employees was not arbitrary or unconstitutional because they are safety sensitive employees. However, I gave plaintiff leave to replead his equal protection claim to demonstrate that the City does not have a rational basis for applying a more stringent drug testing standard to FDNY employees than to other city employees. The amended complaint does not allege near facts which would change such a determination.[18]

For the reasons discussed in the April 1 order, I also determined that if plaintiff intended to bring his equal protection claim not based on his membership in a class of FDNY employees but rather on a "class of one" equal protection violation theory, his complaint as originally filed failed to allege facts that he was treated differently from others similarly situated who were

subject to drug testing. Although it is not entirely clear that plaintiff is alleging a "class of one" equal protection claim in his amended complaint, he has alleged additional facts which suggest that he was intentionally treated differently from others similarly situated who were subject to drug testing.

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated should be treated alike. "City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985) ; see also Harlen Assocs. Inc. v. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001). The Supreme Court has "recognized successful equal protection claims brought by a `class of one' where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) ; Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty, 488 U.S. 336 (1989)). To prevail on a "class of one" claim, plaintiff must allege "irrational and wholly arbitrary" acts and "intentional. disparate treatment." Giordano v. City of New York, 274 F.3d 740, 751. (2d Cir. 2001) (quoting Olech, 528 U.S. at 564).

In his amended complaint, plaintiff still fails to allege facts indicating that he was treated differently than others similarly situated with respect to the laboratory defendants or Dr. Kelly. As in the previous complaint, nowhere in plaintiff's amended complaint does he mention other firemen who underwent random drug testing and were treated differently by any of the

laboratories. Moreover, although plaintiff alleges that Dr. Kelly "made a false report of plaintiff's test results, as positive when the Federal Guidelines require a negative finding," (Compl. at 1125) this is not an example of disparate treatment because plaintiff is using "false" in the sense that the test results were subject to the stricter fire department standards rather than the more lenient federal guidelines. Presumably, Dr. Kelly would have to make such a "false" (i.e. based on stricter guidelines) report of any other fireman subject to a drug test because the standards used by the fire department are stricter than the federal guidelines, and plaintiff has not alleged otherwise. Consequently, plaintiff's Section 1983 claims on the basis of equal protection violations are dismissed with prejudice in regards to the laboratory defendants and Dr. Kelly.

However, plaintiff does raise new allegations in his amended complaint which could give rise to an inference that other firemen who underwent drug testing were treated differently by the city of New York. Plaintiff alleges that the fire department adopted a policy of "enforcing stricter drug testing standards upon plaintiff, an African American." (Compl. at Par. 38). In support of this claim of stricter enforcement of drug standards in regards to plaintiff as opposed to other firemen, plaintiff identifies two white individuals who applied for employment with FDNY after testing positive for controlled substances and were not only hired despite having failed such a test but were subject to more lenient Stipulation and Agreements than the plaintiff. (Compl. at Pars. 113, 6-7). Plaintiff also identifies a third white fire department employee who after his "first infraction" (which I assume to mean

failure of a drug test), was also subject to a more lenient Stipulation and Agreement than the plaintiff. (Compl. at Pars. 113, 8). Plaintiff also alleges that he was tested with far greater frequency than other similarly situated firemen, including the three white individuals described above. (Compl at Pars. 39, 113). Because these additional factual allegations create a reasonable inference of intentional disparate treatment by the City of New York, for which there is no rational basis, I will not dismiss plaintiff's § 1983 claim for violation of equal protection against the City of New York for failure to state a claim.

Defendant City of New York also argues that plaintiff's 1983 claims arising prior to April 14, 2000 are time-barred due to a three-year statute of limitations. Marrero v. City of New York, 2004 WL 444548 at *3 (S.D.N.Y. 2004)("New-York-based Section 1953 claims are subject to a three year statute of limitation from the date of accrual.") (citing Owens v. Okure, 488 U.S. 235, 236 (1989); Connolly v. McCall, 254 F. 3d 36, 40-41 (2d. Cir. 2001)). "While state law supplies the statute of limitations for claims under 1953, federal law determines when a federal claim accrues. The claim accrues when plaintiff knows or has reason to know of the harm." Eagleston v. Guido, 41 F. 3d 865, 871 (2d Cir. 1994) ; Connally, 254 F. 3d at 40-41.

The City of New York asserts that claims related to plaintiff's entering into the Stipulation and Agreement on July 21, 1999 are time-barred. However, because plaintiff would not necessarily have "known or had reason to know" of the defendant's allegedly discriminatory motive at the time he entered the Stipulation and Agreement, the date of entry into the

agreement should not serve at the date of accrual. At the time he entered the agreement, plaintiff had no reason to doubt that similarly situated white employees were subject to the same type of agreement and that such agreements were enforced in a similar fashion. Plaintiff's complaint gives rise to the inference that when he entered the Stipulation and Agreement, he did not know nor did he have reason to know that it was more cumbersome and more strictly enforced than for similarly situated white firemen. Thus, the date of accrual would not be July 21, 1999, the date he entered into the agreement, but rather when he knew or had reason to know the allegedly discriminatory motive. Consequently, plaintiff's § 1983 equal protection claim against the City of New York based on the Stipulation and Agreement is not time-barred. City of New York's motion to dismiss plaintiff's Section 1983 equal protection claim is denied.

49 C.F.R. Part 40

Interpreting plaintiff's complaint liberally, it appears he intends to bring a Section 1983 claim for the violation of standards set forth in 4 C.F.R. Part 40. In this case, plaintiff alleges that defendants violated 49 C.F.R. Part 40, et seq., by failing to properly store his specimen, failing to maintain a chain of custody, failing to adhere to privacy standards, and by employing an excessively low cutoff standard for the testing of morphine. For the reasons discussed in the April 1 order, while 49 C.F.R. Part 40 does not provide for a private claim for relief for individuals seeking the enforcement of its provisions, the provisions may still form the basis of a Section 1983 claim. See Griffin v. Long island Railroad, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, *27

(E.D.N.Y. June 5, 1998)

In the April 1 Order, I noted that it is a violation of a federal right, not simply a federal law which is required to form the basis of a Section 1983 action. Blessing v. Freeston, 520 U.S. 329, 340 (1997). I found that just as inadequate notice and the lack of a re-testing opportunity interferes with a employee's ability to defend himself and challenge the validity of a positive test result, Burka v. New York City Transit Auth., 739 F.Supp.814 (S.D.N.Y. 1990), improper storage and breaks in the chain of custody of a specimen likewise interfere with an employee's ability to defend himself in that the specimen itself is denatured or not available for retesting--which by extension amounts to a denial of due process. However, I also determined that in order to hold municipal defendants (and laboratory defendants acting as instruments of the government) liable under a Section 1983 action, plaintiff is required to establish that the violations occurred pursuant to an established policy, practice or custom, or that a high official was directly involved in the mishandling of the specimen. See onell v. Department of Social Services of the City of New York, 436 U.S. 658, 594 (1978)(holding that a "local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents" unless the injury represents execution of an "official policy" of the government.) A policy may be official for Section 1983 purposes even though it is not officially recognized when "it is so well-settled as to constitute custom." Anthony v. CIty of New York, 339 F.3d 129,139 (2d Cir.2003). Because plaintiff's original complaint did not allege any such facts, his Section 1983 claims for violations of the DOT testing and storage procedures were dismissed with leave to replead.

Plaintiff's amended complaint fails to remedy this deficiency. While plaintiff in his amended complaint elaborates on his original allegations of the mishandling of his specimen by providing more detail, his allegations still fail to give rise to an inference that the mishandling occurred pursuant to an official policy or established custom as opposed to occurrences of individual employee error. Accordingly, plaintiff's Section 1983 claim in this regard must be dismissed with prejudice.

Plaintiff also alleges violation of his liberty and privacy interest as protected by the DOT regulations, brought under Section 1983 against defendants City of New York, B&S and Quest. Specifically, plaintiff alleges that the City of New York violated this protected interest when, the fire department published plaintiff's suspension from duty "not for the 'alleged use' but for the `Use of a Controlled Substance, i.e. Opiates and Morphine'. . .(Compl. at 101)(Compl. Ex.U). In addition, plaintiff seems to be alleging that these interests were violated by the City of New York when the fire department publicized plaintiff's "name, position and social security number.." to laboratory defendant B&S. (Compl. at 77).

In the April 1 Order, I dismissed with leave to replead plaintiff's privacy and liberty claims against the City for its publication of plaintiff's suspension because the plaintiff alleged no consequence from the publication. Plaintiff's liberty interests affected by publication of private information are only affected if there are consequences that flow from the publication. Cf. Paul v. Davis, 424 U.S. 693 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 574 (1972) ; Johnson v. Martin, 943 F. 2d 15 (7th Cir. 1991) In his amended

complaint, plaintiff alleges that the fire department's publication of his suspension "exposed him to ridicule, scorn and derision among his colleagues." (Compl. at Par. 102). Plaintiff does not allege any consequence from the fire department's publication of his name and social security number to B&S and Quest for the purposes of testing.

While reputational stigma alone apart from some more tangible interest such a "loss of other employment opportunities as a result of public disclosure" is not enough to implicate plaintiff's liberty interests, Paul, 424 U.S. at 701; Roth, 408 U.S. at 574, when reputation is impugned in connection with termination from government employment, plaintiff may assert a stigma-plus claim. As discussed previously in the connection with plaintiff's due process claim for deprivation of liberty against the City of New York, plaintiff's amended complaint gives rise to the inference that the requirements for a stigma-plus claim are satisfied. Consequently, City of New York's motion to dismiss this claim is denied.

Although I construed plaintiff's original. complaint as alleging privacy claims only against the defendant City of New York, in his amended complaint, plaintiff makes a vague reference to the "publication and dissemination of false test results by Defendants Bender, Quest and the City of New York." (compl. at Par. 127). However, at no other place in the complaint does plaintiff allege that the laboratory defendants Quest and B&S publicized results of his test anywhere or allege in what manner this publication was made. Moreover, he seems to contradict this assertion of publication by elsewhere describing his difficulty in obtaining test results from

these defendants. (Compl. at 106). Nor does plaintiff allege that he has suffered harm from any alleged publication by B&S or Quest. Because plaintiff's assertions against B&S and Quest in this regard do not rise above the level of conclusory allegations, plaintiff's privacy and liberty claims brought under Section 1983 are dismissed with respect to B&S and Quest.

Disability Discrimination

Plaintiff asserts an employment discrimination claim against defendant city of New York under both the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973.[19] For the reasons discussed in the April. 1 order, I held that plaintiff's complaint adequately alleged claims under Title II of the ADA [20] and Section 504 of the Rehabilitation Act, neither of which requires a complainant to exhaust administrative remedies prior to filing suit.[21] See Sworn v. Western New York Children's Psychiatric Center, 269 F. Supp. 2d 152, 158 (S.D.N.Y. 2003) ; Shariff v. Artuz, 2000 WL 1219381, *3 (S.D.N.Y. Aug. 28, 2000) (Chin, J.); Henchey v. Town of North Greenbush, 831 F. Supp. 960, 968 (N.D.N.Y. 1993)(collecting cases); Finley v. Giacobbe, 827 F.Supp. 215, 219 (S.D.N.Y. 1993) ("There is no requirement under the Rehabilitation Act that nonfederal employees exhaust administrative remedies.").

Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. § 12.32.

Similarly, Section 504 of the Rehabilitation Act states, in relevant part, that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794. Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, claims brought under both can be considered in tandem. Rodriguez v. City of New York, 197 F. 2d 611, 618 (2d Cir. 1999); see also Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) .

In an employment discrimination suit, the complaint need not establish a prima facie case of discrimination, but need only to comply with Rule 8(a)(2) and provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002)(quoting Fed. Rule Civ. Pro. 8(a)(2)) (abrogating Tarshis v. Riese Organization, 211 F.3d 30 (2d Cir. 2000); see Gmurzynska v. Hutton, 355 F.3d 206 (2d Cir. 2004) (per curiam) (acknowledging the liberal pleading standards reaffirmed in Swierkiewicz) . For the reasons discussed in the April 1 Order, I determined that plaintiff's complaint for disability discrimination against the defendant City of New York adequately alleged: (1) he is an individual with a disability within the meaning of the ADA and the Rehabilitation Act; (2) he is otherwise qualified to perform as a firefighter; (3) he was terminated because of his disability; and (4) the FDNY receives federal funding. Accordingly, I denied the City's motion to dismiss plaintiff's disability discrimination claims.

Defendant City of New York now moves to dismiss plaintiff's Title II ADA claims and Rehabilitation Act claims on the grounds that they are time-barred. Both § 504 of the Rehabilitation Act and Title II of the ADA are silent with respect to statute of limitations. See 29 U.S.C. § 94 and 42 U.S.C. § 12132. The Second Circuit has held that "actions under 504 of the Rehabilitation Act are governed by the state statute of limitations applicable to personal injury actions," Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir.1992), which in New York is three years. In applying this statute of limitations, the Second Circuit reasoned that "the discrimination prohibited by § 504-though addressing a different bias-is like that forbidden by civil rights laws" and " [l]ike § 1983" may be described as "conferring a general remedy for injuries to personal rights." Id; See also Harris v. City of New York, 186 F.3d 243, 247-48 (2d Cir.1999){a cause of action arising under the Rehabilitation Act is subject to the same three-year statute of limitations period as Section 1983 actions in New York. Applying a similar logic to the plaintiff's Title II ADA claims in this case, the three-year statute of limitations "would be the most appropriate or analogous state statute of limitations." Id. at 125; Hason v. Office of Professional medical Conduct, 14 F.Supp. 2d 241, 247 n.3 (S.D.N.Y. 2004) ; Downs v. Massachusetts Bay Transportation Authority, 13 F. Supp. 2d 130, 136 (D.Mass.1998)(holding that a cause of action arising under Title II of the ADA is subject to the relevant state's statute of limitations for personal injury claims). As plaintiff initiated the present action on April 14, 2003, a three-year statute of limitations would bar plaintiff from asserting claims that accrued prior to April 14, 2000.

"Federal law governs the question of when a federal claim accrues notwithstanding that a state statute of limitations is to be used." Morse, 973 F.2d at 125. A claim accrues when the plaintiff "knows or has reason to know" the basis of the action. Id. In analyzing the timing of accrual in the context of discrimination claims, the "proper focus is on the time of the discriminatory act ... " Chardon v. Fernandez, 454 U.S. 6, 8(1981); Morse, 973 at 125. Thus, "the timeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision." Id; see also O'Malley v. GTE Serv. Corp. 758 F. 2d 818,820 (2d Cir. 1985). Plaintiff alleges that the fire department's failure to grant him medical leave on February 14, 2000 and March 7, 2000 constituted violations of the ADA and Section 504 of the Rehabilitation Act. (Compl. at 58). Because both of these allegedly discriminatory decisions took place before April 14, 2000, and plaintiff would have known or had reason to know the basis of these actions, plaintiff's disability discrimination claims based on these discriminatory acts are time-barred. However, it can also be inferred from the complaint that the latest possible discriminatory act alleged by plaintiff would be the termination of plaintiff's employment on December 14, 2002. Because this took place after April 14, 2000, a claim of disability discrimination on the basis of this act is not time-barred.

Section 1981 and New York Executive Law Section 290 ("SHRL")

Plaintiff's amended complaint also asserts claims pursuant to Article 15 of the New York State Human Rights Law, New York Executive Law Section 290

("SHRL")[22] and 42 U.S.C. Section 1981 for employment discrimination based on race and retaliation. The amended complaint is ambiguous as to which defendants are the subject of these claims. Plaintiff asserts that the "adoption and enforcement of the. . .Stipulation and Agreement. . .were racially motivated and construe violations of 1981. . .and NY State Executive Law 290." (Compl. at Par. 7). Plaintiff also asserts that the racially-based treatment of Captain Blume of the FDNY constituted violations of "1981, Title VII and New York State Executive Law 290." (Compl. at Par. 53). Elsewhere, plaintiff alleges that the "acts and omissions of the defendants City of New York and Dr. Kerry Kelly...violated Sections 1981. . .and the New York State Executive Law 290" (Compl. at Par. 125) and that plaintiff's "discharge without a hearing constitutes violation of 1981. . ." (Compl. at 128). These being the only clear invocations of the aforementioned statutes, I will construe plaintiff's claims pursuant to SHRL and 42 U.S.C. 1981 as being alleged only against the municipal defendants, and not the laboratory defendants.

The municipal defendants' sole argument for dismissal of these claims is that a three-year statute of limitations applies both to plaintiff's SHRL claims and Section 1981 claims, causing any cause of action arising before April 14, 2000 to be time-barred. Municipal defendants allege that this would include any claims related to plaintiff's entering the Stipulation and Agreement on July 21, 1999, plaintiff's suspensions in 1999, and plaintiff's failure to receive medical leave in February and March of 2001. I will address municipal defendants' motion in regards to Section 1981 and SHRL in turn.

Section 1981

Section 1981 of Title 42 of the United States Code guarantees all person within the United States the right "to make and enforce contracts," 42 U.S.C. § 1981(a), which includes the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Id at § 1981(b); see also Lauture v. Int'l Bus. Machs. Corp. 215 F.3d 258,61 (2d Cir. 2000). Courts have construed § 1981 primarily to apply to claims of race-based employment discrimination and hostile work environment. See Sleigh v. Charlex, Inc. 2004 WL 2126742 at (S.D.N.Y. 2004) ; Whidbee v. Carzarelli Food Specialities, Inc. 223 F.3d 52,69 (2d Cir. 2000). Section 1981 contains no statute of limitations of its own, and federal courts have traditionally applied the forum state's statute of limitations for personal injury actions when deciding § 1981 claims. Sleigh, 2004 WL at *3; King v. American Airlines, Inc., 284 F.3d 352,256 (2d Cir. 2002) ; see also Goodman v. Lukens Steel Co., 482 U.S. 656, 660-61 (1987). In New York, the statute of limitations for filing personal injury actions is three years from the date the cause of action arose, and courts in this circuit have consistently applied the three-year limit to § 1981 actions. See N.Y. C.P.L.R. § 214(2),(5); Patterson v. County of Oneida, N.Y., 375 F.3d 205,225 (2d Cir. 2004).

In May 2004, the Supreme Court ruled that the four-year "catch-all" federal statute of limitations established in 28 U.S.C. § 1658(a) applied to § 1981 suits based on amendments to the statute rule by the Civil Rights Act of 1991, Pub.L.No. 102-166. See Jones v. R.R. Donnelly & Sons Co., 124 S.Ct. 1836, 1845 (2004). The plaintiffs in

Donnelly, similar to Mr. Thomas, claimed that they were subject to discrimination, wrongful termination and hostile work environment under Section 1981. The Court held that because the action arose under portions of Section 1981 that were added in 1991, the catchall four-year statute of limitations applied. Id. at 1840; see also Nicholls v. Brooldale Univ. Hosp. Med. Ctr., No. 03-6233, 2004 WL 1533831, at * 3 (E.D.N.Y July 9, 2004) (applying the four--year period to a pending § 1981 case based on Donnelly). Because under Donnelly, the four year statute of limitations period is applicable to the present case, and plaintiff's entry into the Stipulation and Agreement on July 21, 1999, subsequent suspensions, and plaintiff's failure to receive medical leave in 2001 all occurred after April 14, 1999, municipal defendants' motion to dismiss claims under §1981 as time-barred is denied.

NYSHRL

Plaintiff has also alleged a supplemental claim under New York State Human Rights Law, which in relevant part prohibits an employer from discriminating on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status," New York Executive Law § 296 (a), and forbids retaliation against employees who have complained of or opposed discriminatory practices Id. at § 296(e) . The New York Human Rights Law has a three-year statute of limitations. N.Y. C.P.L.R. §214(2); see Lightfoot v. Union Carbide Corp., 110 F. 3d 598, 907 (2d Cir. 1997)("'A claim under the NYSHRL must be filed within three years of the alleged discriminatory act.") Murphy v. American Home Products Corp., 58 N.Y.2d

293,297 (1983). "An employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to the plaintiff." Milani v. IBM Corp.. 323 F. Supp. 2d 434, 451 (2004). A civil, action is commenced by service, delivery or filing of the summons, not by filing the complaint. Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 306, 461 N.Y.S.2d 232 (1983). In this case, the summons and complaint were filed on April 14,2003, preventing plaintiff from asserting claims that accrued prior to April 14, 2000. The inquiry does not end there, however.

To the extent that plaintiff appears to claim that the discrete incidents of discrimination, taken together, can be considered a continuing violation, entitling him to bring a cause of action based on acts that occurred prior to April 14, 2000, this argument is foreclosed by the Supreme Court decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002).[23] In Morgan, the Supreme Court explained that "discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges." Id. At 113. Instead, "each discrete discriminatory act starts a new clock far filing charges alleging that act," and even serial violations-a series of discrete but related acts of discrimination-do not warrant application of the continuing violations doctrine. Id. Here, each of the acts that defendant City of New York asserts is time-barred--plaintiff's entry into the Stipulation and Agreement, Plaintiff's suspensions in 1999, and the fire department refusal to grant Plaintiff medical leave in February and March 2001--is properly considered a discrete discriminatory act that is subject to its own statute of limitations.[24]

However, plaintiff may be able to assert claims based on acts that occurred before that date if he can show that he learned about the acts after April 14, 2000. Under New York law, a cause of action accrues "when the claim becomes enforceable, i.e. when all elements of the [claim] can be truthfully alleged in a complaint." Damino v. City v of New York, 2004 WL 2032515 at *5 (E.D.N.Y. 2004), citing Snyder v. Town Insulation, Inc., 81 N.Y.2d 429,432 (1993). Although generally, a claim of employment discrimination accrues when the employer commits an allegedly discriminatory act, "when an employee is actively misled by the employer about the motive for the action, and only later has reason to discover a discriminatory motive, accrual may be delayed." Domino, 2004 WL at *5; see also Miller v. International Telephone and Telegraph Corp., 755 F. 2d 20, 24 (2d Cir. 1985).

Here, plaintiff's amended, complaint gives rise to the inference that he was misled by the fire department into believing that the Stipulation and Agreement into which he entered was no stricter than for similarly situated white fireman; thus, the date of accrual, would not be July 21, 1999, the date he entered into the agreement, but rather when he knew or had reason to know the allegedly discriminatory motive. However, because plaintiff's amended complaint does not give rise to a similar inference regarding the suspensions imposed on him by Captain Blume in 1999, who according to plaintiff's complaint, had also verbally harassed him and used racial epithets on those occasions, and, the fire department's denial of his requests for medical leave, which occurred within a few months of the allegedly discriminatory suspension, the SHRL claims based on those events are time-barred.

However, to the extent that the motion to dismiss plaintiff's SHRL claims as time-barred incorporates discriminatory acts aside from the ones disposed of here, the motion to dismiss is denied without prejudice.

CONCLUSION

For the reasons set forth above, (1.) defendants' motion to dismiss plaintiff's amended complaint on the grounds that is it untimely and unsigned is denied; (2) plaintiff's claim far relief

pursuant to 42 U.S.C. § 1985 is dismissed with prejudice; plaintiff's claim for relief pursuant to 4 U.S.C. § 1983 is dismissed with prejudice as to all defendants, except for plaintiff's § 1983 claims against the City of New York; (4) defendant City of New York's motion to dismiss disability claims under Section 504 of the Rehabilitation Act and Title II of the ADA as time-barred is granted in part and denied in part; (5) municipal defendants' motion to dismiss plaintiff's 42 U.S.C. § 1981 claims as time-barred is denied; (5) municipal defendants' motion to dismiss certain NYSHRL claims as time-barred is denied in part and granted in part.

The Clerk is directed to furnish a filed copy of the within to all parties and to the magistrate judge.

Footnotes

1In 1991, Congress passed the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), which, among other things, amended the Federal Aviation Act, Federal Railroad Safety Act, and

Commercial Motor Vehicle Safety Act to require drug testing for transportation employees in safety sensitive positions. See Federal Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992). FOTETA requires mandatory pre-employment, reasonable suspicion, post-accident, and random drug testing of covered aviation, railway, commercial motor carrier, and mass transit transportation workers. Id. FOTETA and the Department of Transportation ("DOT") regulations promulgated pursuant to FOTETA apply to "transportation employers, safety- sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents." Id; 49 C.F.R. Part 40.1.

2 Plaintiff's original complaint asserted claims against the New York City Fire Department (FDNY) and Uniform Firefighters Association (UFA). The Court dismissed FDNY as a party to the suit on the basis that it lacked the capacity to be sued under New York City Charter § 390, and construed all claims against FDNY as claims against the City of New York. The Court's Order also dismissed all claims against the UFA with leave to replead. Plaintiff does not name the UFA as a defendant in its Third Amended Complaint. Plaintiff's original complaint also alleged a RICO claim against defendants, which the Court dismissed with leave to replead. Plaintiff has apparently chosen not to replead the RICO claim, for it is not mentioned in the Third Amended Complaint.

3 Plaintiff included a Title VII claim in his original complaint and subsequently withdrew it in response to

defendants' assertion that the plaintiff had failed to receive a notice of right to sue from the EEOC prior to instituting the action. Before the Court's Order was issued, however, plaintiff informed the Court of the receipt of his right to sue notice from the EEOC and requested leave to reassert the Title VII claims. On Feburary 5, 2004, this Court issued an order to show cause, returnable on March 10, 2004, why plaintiff should not be permitted to file an amended complaint. The City and the UFA objected to plaintiff's request to amend the complaint, but conceded that the procedural defect had been remedied. On March 10, 2004, the Court granted plaintiff's request to amend the complaint and directed that it be filed together with any other permitted amendments.

4 A primary specimen is "the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system," 49 C.F.R. § 40.3. The split specimen is that "part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result." Id.

5 The DOT regulations for "safety sensitive positions" specifies a 2000 ng/ml cutoff concentration level for morphine in 49 C.F.R. § 40.87.

6 The amended complaint is very unclear as to who allegedly lost the specimen. While plaintiff appears to allege that LabCorp lost the urine specimen (Compl. at 1152), at the same time, plaintiff appears to allege that

Susan Mills of Quest had not yet transferred the urine sample to LabCorp during the period it was allegedly lost because she had not yet received the proper authorization from FDNY for DNA testing. (Compl. at Par. 144).

7 In the letter, Anthony Winston, Associate Technical Director of Forensic identity Testing at LabCorp stated:

> It is my opinion that the insufficient quantities of DNA obtained from this sample was possibly due to the sample not being thoroughly mixed prior to being aliquoted, the small volume of urine (8mls) and the samples long term storage conditions. All could have affected the quality and quantity of DNA in this sample, but it is also possible that the sample simply did not contain sufficient cellular material to begin with.

(Comp. Ex. T.)

8 A litigation package is apparently a collection of portions of the original specimen to be used in litigation when test results are in dispute. Cf. 4 C.F.R. § 40.365 (laboratory falsification, concealment or destruction of "documentation concerning any part of the drug testing process, including, but not limited to, documents in a 'litigation package'" are examples of serious noncompliance).

9The letter was dated March 4, 2003, postage meter stamped March 15, 2003, and post marked March 18, 2003.

10 As previously discussed, plaintiff's original complaint also referred to a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which was dismissed by the Court with leave to file an amended complaint alleging compliance with the exhaustion requirements of the statute. The original complaint also included state law claims for breach of fair representation against defendant UFA, which were dismissed without prejudice, but plaintiff asserts no claims against UFA in its Third Amended Complaint.

11 Plaintiff requested and was granted an enlargement of time to file the amended complaint until May 27, 2004.

12 Article 15 of the New York Executive Law Sec. 290 et seq. Section 296(a) defines employment discrimination based on the "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual" as unlawful, and Sec. 296(e) forbids retaliation against employees who have complained of or opposed discriminatory practices.

13 Some circuits, such as the Ninth Circuit, have interpreted the decision in Swierkiewicz as standing for the proposition that pleadings based on conclusioy allegations of discrimination should not be dismissed. Maduka v. Sunrise Hosp. 375 F.3d 909, 912 (91h Cir. 2004) ("The district court['s]...conclusion that the Complaint was inadequate ...because it included only conclusioy allegations of racial discrimination, and... fail[ed] to allege any fact or facts constituting either direct or circumstantial evidence of discrimination-is inconsistent with Swierkiewicz's willingness to allow

lawsuits based on conclusiory allegations of discrimination to go forward").

The Second Circuit has not specifically ruled on this issue. In Toussie v. Powell, 323 F.3d 178 (2d Cir.2003), the Second Circuit remarked in dicta that it did "not have occasion to consider whether its prior statement in Polur (that '[i]t is incumbent on a plaintiff to state more than conclusioy allegations to avoid dismissal of a claim predicated on conspiracy to deprive him of his constitutional rights') remain[ed] valid in light of [Swierkiewicz]." Id. at 185 n. 3. However, subsequent to its decision in Touisse, the Second Circuit rendered a decision in Wynder v. McMahon, 360 F.3d 73 (2d Cir.2004) that appeared to suggest that were it to directly rule on the issue, the Second Circuit would still require a claim to contain factual allegations in order to withstand a Rule 12(b)(6) motion. In Wynder, an African--American New York State Police officer asserted a race discrimination claim. Id. at 101. After concluding that the complaint was sufficient to meet the lenient pleading standard under Rule 8, the court cautioned:

> This is not to say, of course, that all aspects of the complaint will ultimately survive dismissal. For one thing, there is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6) that a plaintiff state a claim upon which relief can be granted ... As a result, a series of 12(b)(6) motions to dismiss would lie to permit each particular defendant to eliminate those causes of action as to which no set of facts has been identified that support a claim against him.

The last sentence, in particular, supports the contention that the Second Circuit wound continue to require that even in the absence of a heightened pleading standard, a claim need be supported by factual allegations to survive a 12(b)(6) motion to dismiss.

14 As plaintiff does not reference any particular confidentiality statute, I will assume that he is referring to the privacy protections in the DOT testing regulations.

15 1 found that the facts alleged in the complaint permit the inference that laboratory defendants were acting under color of state law because it is reasonable to infer from the complaint that the laboratories receive a substantial amount of revenue from their relationship with the State as approved laboratories for all drug testing of state and municipal employees, see Leblanc v. Fletcher, 67 F.3d 412, 432 (2d Cir. 1995); they adhere to a policy of drug testing adopted by either New York State or the fire department, see Griffen v. Long island Railroad, 1998 US Dist. LEXIS 19336, *18 (E.D.N.Y. June 5, 1998); and they performed testing and held custody of plaintiff's urine sample at the direction of the fire department, and thus were the responsibility of the fire department, see Coleman v. Town of Hempstead, 30 F.Supp.2d 356, 362 (F.D.N.Y. 1999). I also found that the facts alleged in the complaint permit the inference that Dr. Kelly satisfied the state action requirement because of his alleged supervisory status in the administration of FDNY's drug testing policy and his alleged personal involvement in the alleged constitutional. violation. See Richardson v, Goord, 347 F.3d 431, 435 (2d Cir.2003).

16 "Section 75 [of the Civil Service Law] states that a covered employee 'shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.'" Ciambriello v. County of Nassau, 292 F.3d 307, 314 (2d Cir. 2002 , citing N.Y. Civ. Serv. L. §§ 75(l) (McKinney 1999). Section 75 "gives covered employees a property interest in their employment, so that they may not be terminated without notice and hearing," Id.,citing O'Neill v. City of Auburn, 23 F. 3d 685, 688 (2d Cir.1994)."Section 75 rights, however, may be modified or replaced by a collective bargaining agreement." Id., citing N.Y. Civ. Serv. Law § 76(4) (McKinney 1999).

"[U]nder New York law, Article 78 is a form of proceeding available to compel public officials to comply with their responsibilities." Vandor, Inc. v. Militello, 301 F. 3d 37, 39 (2d Cir. 2002). An Article 78 proceeding can be brought by a terminated civil servant challenging his/her termination and seeking reinstatement. Curtis v. Board of Educ. of Lafayette Cent. School Dist., 487 N.Y.S.2d 439, 447 (4th Dept. 1985). The statute of limitations for instituting such a petition is generally four months. Vandor, 301 F.3d at 39, citing N.Y. C.P.L.R. § 217 (1) .

17 Specifically, plaintiff now asserts in his amended complaint that "the Deputy Commissioner of Legal Affairs forced plaintiff to sign a Stipulation Agreement by asserting that plaintiff would be fired if he failed to sign." (Compl. at 27). Moreover, while Paragraph 22 of the Stipulation and Agreement indicates that plaintiff entered the agreement after '"having been advised... by

counsel," plaintiff now alleges that he signed the Stipulation and Agreement "without the benefit of representation" and "while under a doctor's care and treatment and while under the influence of Zoloft, a prescribed antidepressant." (Compl. at 31-32).

18 Although plaintiff asserts that the New York City Transit Authority applies less strict guidelines set forth under 49 CFR 40 (Compl. at 1120), even assuming that is true, as I suggested in the April 1 Order the Court would still have to assume that FDNY's imposition of stricter testing standards for its safety sensitive employees is constitutional under a rational basis test.

19 Plaintiff does not appear to allege claims of disability discrimination against laboratory defendants. Also, in the April 1 Order, I dismissed plaintiff's disability claims against Dr. Kelly because individuals cannot be held personally responsible under the relevant statutes.

20 Title I is not the exclusive remedy for employment discrimination under the ADA. Title I of the ADA protects qualified individuals with disabilities against employment discrimination in areas such as application procedures, hiring, promotions, compensation, training, and termination. See 42 U.S.C. § 12112(a). Title II, in comparison, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). Although the Second Circuit has not yet resolved the issue of whether an employee of a public entity may bring an employment discrimination claim under Title II, district

courts in this circuit have concluded that such a claim is permitted. See Bloom v. New York City Bd. of Educ. Teachers' Retirement System of City of New York, 2003 WL 1740528 *10-11 (S.D.N.Y. Apr. 2, 2003) (Pitman, M.J.); see also Simms v. City of New York, 160 F. Supp.2d 398, 400 n.1 (E.D,N.Y. 2001) ; Rome v. MTA/New York City Transit, 1997 WL 1048908, *5 (E.D.N.Y. Nov. 18, 1997) (Gleeson, J.); Craboski v. Giuliani, 937 F. Supp. 258, 269 (S.D.N.Y. 1996), "Moreover, other circuits have concluded that Title II permits an employment discrimination claim against a public entity." Bloom, 2003 WL 1740528, *11 (citing Bledsoe v. Palm Beach County Soil and Water Conservation Dist., 133 F.3d 816, 820 (11th Cir.1998) ; Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 (4th Cir.1995). But see Zimmerman v. Oregon Dept of Justice, 170 F.3d 1169, 1173 (9th Cir.1999) (finding that Title II was not applicable in the employment context). Research has disclosed no authority in this circuit reaching a contrary result.

21 Defendant City of New York argues in its response papers that plaintiff cannot sustain a cause of action under Title I of the ADA due to plaintiff's failure to exhaust his administrative remedies. In the April 1 Order, I construed plaintiff's ADA claims as being asserted under Title II due to the fact that plaintiff had not exhausted administrative remedies as required to file a Title I ADA claim. Although plaintiff filed an EEOC charge around February of 2000, the charge focused exclusively on racial discrimination and did not allege discrimination on the basis of disability.

22 Article 15 of New York Executive Law § 290 et seg. Section 296(a) defines employment discrimination based

on the "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual" as unlawful, and § 296(e) forbids retaliation against employees who have complained of or opposed discriminatory practices.

23 Although Morgan involved Title VII claims, its holding regarding continuing violation applies also to NYSHRL claims. See Milani, 322 F.Supp.2d at 452; Staff v. Pall, 233 F.Supp.2d 516, 527-28 (S.L.N.Y.2002) (concluding that the reasoning of Morgan applies to NYSHRL claims).

24 The holding in Morgan did not extend to "pattern-or-practice" claims; however, for a pattern and practice claim, plaintiff must allege more than sporadic acts of discrimination; rather plaintiff must establish that intentional discrimination was the defendant's standard operating procedure." Robinson Metro-North Commuter R.R.Co., 267 F.3d 147,158 (2d Cir.2001), In this case, the facts alleged by plaintiff do not give rise to an inference of a pattern and practice of discrimination by the City of New York. The plaintiff "may not... convert discrete acts into a pattern and practice merely by invoking those words, and absent any allegation or evidence that the defendant employed a discriminatory policy or practice in a systematic way, ..convert a series of discrete acts into a pattern or practice of discrimination. Milani, 322 F.Supp.2d at 452 (citing Timonthy v. Our Lady of Mercy Med. Ctr., 2004 WL 503760, at *3 (S.D.N.Y. 2004). It is "by no means clear that a private plaintiff can even bring a 'pattern or practice' claim in a non-class action complaint." See Blake v. Bronx Lebanon Hosp. Ctr. 2003 WL 21910$67

at *5 (S.D.N.Y. 2003).

Filed: 4/1/2004
CV-03-1797 (CPS)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Claude Thomas,
Plaintiff,

- against -

The City of New York, Bendiner and Schlesinger, Quest Diagnostics Incorporated, Laboratory Corporation of America Holdings, and Kerry Kelly, M.D.,
Defendants.

SIFTON, Senior Judge.

Plaintiff brings this civil rights action against the City of New York, the New York City Fire Department, Bendiner and Schlesinger, Quest Diagnostics Incorporated, Laboratory Corporation of America Holdings, UFA Uniform Firefighters Association, and Kerry Kelly, M.D. accusing them of conspiring to deprive him of rights under the Department of Transportation[1] drug testing regulations based on his race, violating his due process and equal protection. rights, racketeering, and discriminating against him on the basis of disability. The litigation arises out of the New York City Fire Department's termination of plaintiff' employment based on a urinalysis that detected a controlled substance.

Defendants Quest Diagnostics Incorporated ("Quest"),

Bendiner and Schlesinger ("B&S"), and Laboratory Corporation of America ("LabCorp") move to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim against them upon which relief can be granted. Defendant Uniform Firefighters Association ("UFA") moves for dismissal pursuant to Rule 12(b)(6), and in the alternative, pursuant to 28 U.S.C. 1367, for an order dismissing all state law claims against it. Defendants City of New York, New York City Fire Department ("FDNY") and Dr. Kerry Kelly ("municipal defendants") move pursuant to Federal Rules of Civil Procedure 12 (c) for a judgment on the pleadings.

For the following reasons, the motions are granted in part and denied in part.

BACKGROUND

The following facts are drawn from the complaint and attached exhibits, as is appropriate given the nature of the motions.

Plaintiff, an African-American male, joined the New York City Fire Department on November 12, 1989 as a Firefighter First Grade. On July 21, 1999, plaintiff signed a Stipulation and Agreement ("Stipulation") with the FDNY in which plaintiff admitted the use of a controlled substance on May 24, 1999, leaving the scene of an accident on June 7, 1999, and violating the FDNY's Oath of Office. The Stipulation provided that plaintiff would be subject to frequent random testing for controlled substances.

Subsequent to signing the Stipulation, plaintiff says he

was subject to verbal abuse from commanding officers in the presence of co-workers and others. One such incident is said to have occurred on November 15, 1999. A Captain Blume is said to have yelled at plaintiff, using expletives, for not moving quickly enough when ordered upstairs. In the presence of a Bureau of Investigation and Trials ("BIT") officer, Captain Bloom allegedly "placed his index finger on plaintiff's cheek and screamed in plaintiff's face "Mother f....r, who do you think you are? When I give you a f...ing order, you better listen boy, you f...ing a..hole." (Comp. Par. 18.) Captain Blume suspended plaintiff for 30 days and is said to have told plaintiff as plaintiff was changing into civilian clothes, "we got you nigger." (Comp. Par. 23-24).

Plaintiff returned to the firehouse from his suspension on December 17, 1999 and was immediately suspended for another 30 days by Captain Blume far allegedly not turning the volume down on the television quickly enough when ordered to do so. Plaintiff, suffering severe chest pains as a result of the confrontation, was removed from the fire house by Emergency Medical services. Plaintiff was, at the time, taking anti-depressant medication and was being treated by Dr. Richard G. Dudley, Jr., a psychiatrist, for job-related stress. Dr. Dudley subsequently submitted a letter to the FDNY, dated February 14, 2000, requesting medical leave on behalf of plaintiff, which was denied. Dr. Dudley renewed the request by letter dated March 7, 2000, which was again denied. Sometime in February 2000 plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC").

Plaintiff's urine was tested for drugs approximately 29 times between July 21, 1999 and October 24, 2002, with

negative results each time. Generally, the urine specimens were split into two, a "primary" specimen and a "split" specimen. A primary specimen is "the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system." 49 C.F.R. § 40.3. The split specimen is that "part of the urine specimen that is seat to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result." Id. Pursuant to a contractual agreement with the FDNY, plaintiff's October 24, 2002 urine sample, like all the previous samples, was first tested by defendant B&S. The October 24,2002 urine specimen tested positive for morphine at 1353 ng/mL. The FDNY specifies a 300 ng/mL cutoff level for opiates, including morphine.[2] As a result of the positive report, plaintiff was ordered to "stand down" on November 4, 2002 - meaning that he was restricted from driving department vehicles and treating patients.

On November 5, 2002, plaintiff submitted a hair follicle and. urine sample to his treating physician, Dr. Dudley, for testing. According to Dr. Dudley's letter to the FDNY, a hair drug screen can determine if a person ingested opiates at any point in time over a period from weeks to years prior to the sample being taken. (Comp. Ex. H.) The samples were tested by Quest, a laboratory on the FDNY's list of approved laboratories. The urine tested negative, and according to Dr. Dudley, the hair follicle test was also negative for opiates. (Comp. Ex. H.) Dr. Dudley reported the results to the FDNY on November 14, 2002.

By letter dated November 6, 2002, plaintiff was informed by the FDNY that a s result of the October 24, 2000 positive result and pursuant to the stipulation, he had seven days to submit a re-test request and present relevant evidence on his behalf before the FDNY took final action. The letter also indicated that failure to provide "satisfactory and acceptable mitigation" would result in plaintiff's termination on November 21, 2002. (Comp. Ex. D.)

On November 11, 2002, plaintiff submitted another urine sample to a BIT Lieutenant at the Bureau of Health Services, but never received the results from its testing.

On November 14, plaintiff paid a $108 fee to have his October 24, 2002 specimen re-tested. In a letter dated November 13, 2002 to Quest, Dr. Kelly, the FDNY Chief Medical Review Officer, also requested a re-test of plaintiff's specimen for a confirmation of morphine. At an unknown date, Assistant Commissioner James Drury, on behalf of BIT, sent a urine specimen, attributed to plaintiff, to Quest for a re-test. The request was copied to B&S. A third letter, also undated and attached to a specimen, was sent from B&S to Quest requesting plaintiff's urine be re-tested for morphine. Which specimen each request relates to and what became of both the primary specimen and the split specimen from B&S is not clear.

Plaintiff alleges that the primary specimen of plaintiff's urine was removed from frozen storage at B&S on November 22, 2002, but it was not sent to Quest for re-testing until three days later on November 25, 2002. The specimen was not received by Quest until

December 2, 2003. According to plaintiff's complaint, a December 3, 2002 report from Quest indicates the test revealed morphine levels of 200 ng/mL, below both the FDNY and DOT cutoff levels.

On November 13, 2002, plaintiff was suspended for 30 days because of the initial positive morphine test of his October 24, 2002 urine specimen On November 15, 2002, the FDNY published plaintiff's suspension for violating sections of the Regulations far the Uniformed Force governing the use of controlled substances and the oath of office. By letter dated December 4, 2002, plaintiff was notified that he was terminated, effective December 14, 2002. Immediately upon the notification of his suspension and again upon the notification of his termination, plaintiff, denying the use of any controlled substance other than Zoloft, contacted Robert Straub, the Bronx Trustee of the UFA, requesting that he file a grievance on plaintiff's behalf. Plaintiff alleges that no grievance was filed.

On December 24, 2002, plaintiff advised Deputy Commissioner Clinton that he wanted the urine specimens from B& and Quest to be re-tested to confirm the existence of morphine and for DNA testing. On December 31, 2002, plaintiff executed an authorization for the transfer of specimens from Quest to LabCorp, also on the FDNY list of approved laboratories. On January 2, 2003, plaintiff paid $1500 to LabCorp for the tests. However, on the same date, plaintiff was advised by Susan Mill of Quest that the specimen would not be transferred without FDNY authorization. Eventually the proper authorization was received, but the specimen was sent to the wrong individual or department at Lab Corp. On January 27,

2003, LabCorp reported that it had not received the specimen from Quest, but on January 31, 2003, it was found, Plaintiff was then informed that Ms. Mills, acting under instructions from the FDNY, only authorized a test for a morphine confirmation, not a DNA test. On February 6, 2003, Dr. Kelly transmitted a letter to LabCorp authorizing the DNA testing. Plaintiff was then required to pay an additional 90 fee to LabCorp. LabCorp did not report its findings with respect to the morphine test, but by letter dated March 10, 2003, LabCorp reported to plaintiff that there were insufficient quantities of DNA in the sample to develop a profile. In the letter, Anthony Winston, Associate Technical Director of Forensic Identity Testing at LabCorp stated:

> It is my opinion that the insufficient quantities of DNA obtained from this sample was possibly due to the sample not being thoroughly mixed prior to being aliquoted, the small volume of urine (mls) and the samples long tern storage conditions. All could have affected the quality and quantity of DNA in this sample, but it is also possible that the sample simply did not contain sufficient cellular material to begin with.

(Comp. Ex. T.)

Prior to the testing by LabCorp, plaintiff requested a so-called "Litigation Package" from B&S.[3] Plaintiff made the request in gritting through his attorney on both December 24, 2002 and January 30, 2003. Receiving no response, plaintiff requested the assistance of Deputy Commissioner David Clinton in a letter dated February 26, 2003, and submitted another

letter request to B&S on that same date. By letter dated on March 6, 2003, plaintiff, through his attorney, again requested the Deputy Commissioner's assistance in obtaining a Litigation Package from B&S. Eventually, in late March, plaintiff received a letter from William Closson, Director of Forensic Toxicology, indicating that he was prohibited by law from releasing the Litigation Package to anyone other than the "ordering client /physician."[4] (Comp. Ex. M.) It is unclear from the complaint if plaintiff ever received a Litigation Package from B&S, but one was received from Quest on April 1, 2003 after two previous requests in December 2002 and January 2003.

On April 14, 2003, plaintiff filed his complaint alleging four claims for relief: (1) pursuant to 42 U.S.C.§ 1985(3), conspiracy to contravene the requirements of 49 C.F.R. Part 40 relating to drug testing; (2) pursuant to 42 U.S.C. 1983, deprivation of plaintiff's procedural due process and equal protection rights; (3) pursuant to 18 U.S.C. § 1964(c), violation of 18 U.S.C. § 1962(a), the racketeering statute, by testing and re-testing plaintiff's urine specimen and falsely reporting positive results; (4) pursuant to 29 U.S.C. Sec. 794(a)(2), violation of 29 U.S.C. § 794 by causing plaintiff's discharge because of his disability. In addition, although not included in the listed claims for relief, the preliminary statement to plaintiff's complaint refers to a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and a state law claim for breach of fair representation against defendant UFA. (See Comp. Par. 8.)

Plaintiff seeks reinstatement of his position and $25 million in compensatory damages and treble damages

from each of the defendants, with the exception of the UFA from whom plaintiff seeks $2 million in compensatory damages.

DISCUSSION

Jurisdiction

This Court has jurisdiction over this action pursuant to 8 U.S.C. § 1331, which authorizes jurisdiction over civil actions arising under federal law, 28 U.S.C. § 1343, which authorizes jurisdiction over actions arising under 42 U.S.C. 1953, 28 U.S.C. § 1964, which authorizes jurisdiction over racketeering actions and principles of pendant jurisdiction to the extent the complaint can be read to allege a claim under state law.

Preliminary Matters Title VII Claims

The Preliminary Statement of plaintiff's complaint states that he is bringing the action pursuant to Title VII of the Civil Rights Act of 1964, among others. (Comp. Par. 6.) Plaintiff does not otherwise elaborate on his Title VII claim. In order for plaintiff to bring suit under Title VII, he must first exhaust his administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the loci. state or city counterpart within 300 days of the alleged discriminatory act. Butts v. City of New York Dept. of Hous. Preservation and Development, 990 F.2d 1397, 1401 (2d Cir. 1992) ; Hope v. Cortines, 69 F. 3d 687 (2d Cir. 1995) . Thereafter, plaintiff can initiate civil suit within 90 days of receipt of a right to sue notice. See 42 U.S.C. 2000e-5(f)(1) and 42 U.S.C. Sec. 12117. Plaintiff's

complaint states that he filed a charge with the EEOC in February 2000, but makes no statement that he had received a notice of right to sue prior to instituting this action. In response to defendants' motions that identified this procedural deficiency, plaintiff, in his opposition papers, withdrew the Title VII claim.

However, before a decision was issued on these motions, plaintiff informed the Court of the receipt of his right to sue notice from the EEOC and requested leave to reassert the Title VII claims. On February 5, 2004, this Court issued an order to show cause, returnable on March 10, 2004, why plaintiff should not be permitted to file an amended complaint. The City and the UFA objected to plaintiff's request to amend the complaint, but conceded that the procedural defect has been remedied. In their objections, the City and the UFA "request that the plaintiff make a motion to amend the complaint by which [they] will have a basis either to consent or oppose." (City Letter dated Feb. 17, 2004, at 2.) The laboratory defendants expressed no position on the order to show cause. On March 10, 2004, the Court granted plaintiff's request to amend the complaint and directed that,it be filed together with any other amendments permitted by this decision.

New York City Fire Department

The City notes that all claims against defendant FDNY must be dismissed because it lacks the capacity to be sued under New York City Charter § 395. Section 395 of the New York City Charter provides that "all actions and proceedings for the violation of any law shall be brought in the name of City of New York and not in that of any agency, except where otherwise provided

by law." William v. New York City Police Department, 930 F. Supp. 49, 53-54 (S.D.N.Y 1995 quoting East Coast Novelty Co. v. City of New York, 781 F. Supp. 999, 1010 (S.D.N.Y. 1992). No exception exists with respect to the FDNY. See Parker v. DeBuono, 98 CV 71355, *2 (S.D.N.Y. 1999). Accordingly, all claims against the FDNY will be construed as claims against the City, and the FDNY is dismissed as a party to this suit.

Judgment on the Pleadings and Notion to Dismiss

The municipal defendants seek judgment on the pleadings, and the remaining four defendants seek dismissal for failure to state a claim upon which relief can be granted. A court deciding a motion for judgment on the pleadings under Rule 12(c) applies the same standard used in deciding motions to dismiss for failure to state a claim under Rule 12(b)(6). See Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir.2001). "Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir.1994). In considering a motion under Rule 12(c), a court may consider the pleadings themselves and any documents that are attached as exhibits or incorporated by reference. See Fed. R. Civ. P. 12(c) (stating that courts may consider the pleadings) ; Abiona v. Thompson, 237 F. Supp. 2d 258, 265 (E.D.N.Y. 2002) (noting that "the parties may incorporate certain materials into their pleadings" by referring to them in the pleadings). A court "should not dismiss the complaint ,unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief.'" Id. (quoting Conley v. Gibson, 35 U.S. 41, 45-46 (1957)).

First Claim for Relief: Section 1985 Violations

Plaintiff's first claim for relief alleges violations of his civil rights under 42 U.S.C. § 1985. Section 1985 contains three subsections. Plaintiff does not allege a specific subsection. Section 1985(1) is by its terms inapplicable, as plaintiff does not hold a United States office and is not a candidate for such office. Section 1985(2) is likewise inapplicable as it contains two clauses, one addressed to denial. of access to federal courts and one to denial of access to state courts - neither of which is alleged in any form in plaintiff's complaint, even upon a liberal reading. Section 1985 (3) provides in relevant part;

> If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal. protection of the laws, or of equal privileges and immunities under the lags; ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985 (3).

The Federal Rules of Civil Procedure set forth a liberal. pleading standard. Generally, a complaint need only contain "a short and plain statement of the claim slowing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of the complaint is merely

to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Leatherman, 507 U.S. at 168; Conley v. Gibson, 355 U.S. 41, 47 (1957). However, the Court of Appeals has adopted heightened pleading requirements in actions alleging a conspiracy to violate civil rights. Angola v. Civiletti, 666 F. 2d 1, 4 (2d Cir. 1981). In such cases, fact pleading is required. Id. ; see also White v. Frank, 680 F. Supp. 629, 639 (S.D.N.Y. 1988).

To state a claim for relief under Section 1985(3), a plaintiff must allege four elements: (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws or the equal privileges and immunities under the laws; (3) an avert act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property or a deprivation of a right or privilege of a citizen of the United States. Griffin v. Breckenridgre, 403 U.S. 88, 102-03 (1971) ; Thomas v. Roach, 165 F . 3d 137, 146 (2d Cir. 1999); Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F. 3d 1085, 1087 (2d Cir. 1993) {citing United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983).

Under the standards applicable to a Rule 12(b)(6) motion to dismiss and a Rule 12 (c) motion for a judgment on the pleadings, plaintiff has satisfactorily alleged the first element of a claim under Section 1985(3) with respect to all defendants, except the UFA. Because plaintiff does not allege that defendant UFA was in any way involved in the testing of his urine samples, in determining the proper cutoff measurements for Fire Department employee drug testing, or in the employment actions taken against

him, the first element of a Section 1985 claim against the UFA has not been satisfied and accordingly, this claim against the UFA is dismissed with leave to replead.

With respect to the second element, plaintiff must allege that "the defendants have, with racial or other class-based discriminatory animus, conspired to deprive [hire] of a constitutional or other federal right. Soto v. Schembri, 960 F. Supp. 751, 760 (S.D.N.Y. 1997) (citing LeBlanc-Sternbergr v. Fletcher, 67 F.3d 412, 426-27 (2d Cir. 1995) ; see Thomas, 165 F. 3d at 146; Mian, 7 F. 3d at 1088; Local 610, 463 U.S. at 829. Section 1985(3) provides no substantive rights itself; rather, it merely provides a remedy for violation of the rights it designates Great Am. Fed. Sav. & Loan v. Novotny, 422 U.S. 366, 372 (1979)."As a result, to maintain a claim pursuant to § 1985(3), there must be some predicate constitutional right which the alleged conspiracy violates." Friends of Falun Gong v. Pacific Cultural Enterprise, Inc., 288 F. Supp.2d 273, 279 (E.D.N.Y. 2003) (citing Novotny, at 376; Emanuel v. Barry, 724 F. Supp. 1096, 110 (E.D.N.Y. 1989)). In this case, plaintiff does not identify the constitutional right or federal statutory right of which defendants allegedly conspired to deprive him. The complaint simply references 49 C.F.R. Part 40. As numerous courts have recognized, there is no private right of action, express or implied, under 49 C.F.R. Part 40. Parry v. Mohawk Motors of Michigan, Inc., 236 F. 3d 299, 308-09 (6th Cir. 2000) (no implied private cause of action under 49 C.F.R. Part 40); Drake v. Delta Air Lines, Inc., 147 F. 3d 169, 17 Cir. 1998) (affirming district court's dismissal of plaintiff's claim that defendant violated federal drug testing regulations because there is no implied right of action) ;

Schmeling v. NORDAM, 97 F.3d 1336, 1344 (10th Cir. 1996) (no private right of action to enforce 49 C.F.R. § 40.35) ; Abate v. Southern Pac. Transp. Co., 928 F.2d 167, 168 (5th Cir. 1991) (no implied private cause of action under 49 C.F.R. Part 40) ; Hall v. United Labs, Inc., 1 F. Supp.2d 1039, 1042 (N.D. Ohio 1998) (no private right of action to enforce 49 C.F.R. § 40.33) ; Salomon v. Roche Compuchem Laboratories, Inc., 90 F. Supp. 126, 128 (E.D.N.Y. 1995) (no private right of action to enforce 49 C.F.R. Sec. 40.37). Rather, Congress expressly provided for enforcement of DOT drug testing regulations through an administrative mechanism. See Hall, 1 F. Supp.2d at 1042; Enforcement Considerations, 54 Fed. Reg. 49864, 49865 (December l, 1989).

In addition, plaintiff fails to allege facts sufficient to give rise to the inference that defendants adopted a policy for drug testing that differs from 49 C.F.R. Part 40 because of racial animus, or that they applied the stricter standards to his specimen because of his race. An essential element of a Section 1955 claim for relief is a requirement that the alleged discrimination took place because of plaintiff' race. Mian, 7 F. 3d at 1088. Plaintiff identifies himself as African-American and alleges in his complaint that the actions taken against him were racially motivated. "The mere assertion of racial motivation, however, is not sufficient to state a conspiracy claim." Posr v. Court Officer Shield, 180 F.3d 409, 419 (2d Cir. 1999) (internal citation omitted). Plaintiff offers only one allegation of verbal reference to his race, made by a fire department superior, nearly three years prior to his alleged positive drug test. (Comp. Par. 24.) Accordingly, plaintiff's Section 1985 conspiracy claims are dismissed with leave to replead.

Second Claim for Relief: Section 1983 Claims

Plaintiff's second claim for relief, brought under 42 U.S.C. § 1983, alleges that the defendants, "acting under color of law deprived plaintiff of his right to examine the laboratory data, his right to a hearing and right to employment." (Comp. at 17.) Plaintiff also alleges that his "rights secured by the Constitution and the laws of the United States were breached in violation of 42 U.S.C. § 1983. (Id.) Finally, plaintiff alleges in this claim for relief that the defendants "deprived plaintiff of procedural due process and equal protection of the law through their misrepresentations and their denial of plaintiff's right to a fair hearing all in violation of 42 U.S.C. § 1983." (Id.) Interpreting plaintiff's complaint liberally, he appears to be asserting three claims under Section 1983 - a procedural due process claim, an equal protection claim and a claim to enforce procedural and other rights created by 49 C.F.R. Part 40.

Section 1983 of 42 U.S.C. provides, in pertinent part;

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United Mates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1953. In order to prevail on a Section 1983 claim, plaintiff must establish two elements. First,

plaintiff must establish that defendants acted under color of state law. Second, plaintiff must establish that defendants deprived him of a right secured by the constitution or laws of the United States.

State Action

The "under color of state law" requirement is legally indistinguishable from the "state actions" requirement under the Constitution. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, n. 8 (1999); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) ; Tancredi v. Metropolitan Life Ins. Co., 16 F. 3d 308, 312 (2d Cir. 2003). In order to satisfy the state action requirement where the defendant is a private entity, the allegedly unconstitutional conduct must be "fairly attributable" to the state. Tancredi, 316 F.3d at 312 (quoting American Mfrs. Mut. Ins. Co., 526 U.S. at 51). The Supreme Court has held that private activity can be viewed as state action (1) when it results from the State's exercise of "coercive power," or when the State provides "significant encouragement, either overt or covert," (2) when a private actor operates as a "willful participant in joint activity with the State or its agents," when the private entity is controlled by an "agency of the State," (4) when it has been delegated a public function by the State, and (5) when it is "entwined with governmental policies" or when government is "entwined in [its] management or control." Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 295 (2001) (citations omitted) ; Tancredi, 316 F.3d at 313. These tests are commonly referred to as the "state compulsion" test, the "close-nexus/joint action" test, and the "public function" test. Tewsbury v. Dowling, 169 F. Supp.2d 103, 108 (E.D.N.Y. 2001)

(quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

Laboratory Defendants

In this case, the laboratory defendants and UFA argue that the Section 1983 claims should be dismissed against them for failure to allege state action. An analysis of an allegation of sate action begins "by identifying the specific conduct of which the plaintiff complains." Tancredi, 316 F. 3d at 312 (quoting American Mfrs. Mut. Ins. Co., 526 U.S. at 51). Applying the generous standard of review required on a motion to dismiss, and the criteria set forth above, the Court finds that the facts alleged in the complaint permit the inference that laboratory defendants were acting under color of state law.

Interpreting plaintiff's complaint liberally, he alleges that the actions of the laboratory defendants with respect to the testing, storage and reporting of his urine sample violated his federally protected rights. It can reasonably be inferred from the complaint that the procedures employed by the laboratories with respect to the testing of samples from FDNY employees are consistent with procedures outlined by the FDNY. For example, each laboratory is on a short list of New York State approved laboratories for drug testing. In addition, each laboratory appears to adhere to cutoff standards employed by the FDNY, which are lower than those adopted by the DOT. It is also clear that the laboratories are entwined in the employment procedures of the FDNY, as they are responsible for the drug testing which, with a positive result, can lead to the termination of one's employment with the

FDNY. The inference to be drawn is that the laboratories appear on this last specifically because when testing samples from state employees, they adhere to policy adopted by either the New York state or the FDNY. See Gr ffin v. Long Island Railroad, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, *18, n. 7 (E.D.N.Y. June 5, 1998) (noting that if the railroad was a private entity, its compliance with regulations compelling drug testing would mean it was acting as an instrument of the government) (citing Skinner v. Railway Labor Executives's Ass'n, 489 U.S. 602, 614 (1989).

Another inference that is fairly drawn from the complaint is that the laboratories receive a substantial amount of revenue from their relationship with the State as approved laboratories for all drug testing of state and municipal employees. See LeBianc-Sternberg v. .Fletcher, 67 F. 3d 412, 432 (2d Cir. 1995)(citing Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 621 (1991) (holding that "in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine ... the extent to which the actor relies on governmental assistance and benefits ...") internal. citations omitted)).

Finally, the complaint meets the test for state action because the facts alleged suffice to permit an inference that the laboratory defendants performed testing and held custody of the plaintiff's urine sample at the direction of the FDNY, that such actions were in furtherance of enforcement of the FDNY's drug testing regime, and that the actions of the laboratories in so doing were the responsibility of the FDNY. See Coleman v. Town of Hempstead, 30 F. Supp. 2d 356, 362

(E.D.N.Y. 1999). At this early stage of the litigation, it is reasonable to infer that the laboratory defendants were acting a instruments of the government and, accordingly, may be held accountable under Section 1983.

UFA

However, the same cannot be said with respect to the Section 1953 claim against the UFA. Plaintiff's complaint, liberally interpreted, alleges that the UFA violated his constitutional and federal rights by failing to file a grievance on his behalf. However, plaintiff's complaint alleges no set of facts from which an inference can fairly be drawn that defendant UFA acted under color of state law by failing to file a grievance on his behalf. The facts alleged, liberally interpreted, do not allege that the UFA was coerced by the State, controlled by the State, delegated as a public function, or entwined with governmental policies. In sum, plaintiff presents no set of facts from which it can be inferred that the UFA's actions can be fairly attributed to the City or State. Moreover, the UFA can fairly be considered an adversary, rather than an agent of the City or the FDNY, as it is often working on behalf of individual fire department employees against those entities. Accordingly, plaintiff's Section 1983 claims against the UFA are dismissed with leave to replead.

Dr. Kelly

With respect to defendant Dr. Kelly, plaintiff's complaint, when liberally interpreted, satisfies the state action requirement of a Section 1983 claim.

"Because Section 1983 imposes liability only upon those who actually cause a deprivation of rights, personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §§ 1983." Blyden v. Mancusi, 186 F.3d 252, 264 (2d cir. 1999). Although plaintiff's complaint is not a model of factual. specificity, it can reasonably be inferred from the facts alleged that Dr. Kelly, a the FDNY Chief Medical Review officer, has at least a supervisory role in the administration of the FDNY's drug testing policy and procedures. However, supervisor status alone does not confer potential liability under Section 1983, as the plaintiff must demonstrate the defendant's personal involvement in the alleged constitutional violation. Richardson v. Goord, 347 F.3d 431, 435 (2d cir. 2003).

Supervisor liability under Section 1953 "can be shown in one or more of the following ways: (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring." Richardson v. Goord, 347 F. 3d 431, 435 (2d Cir. 2003) {quoting Hernandez v. Kean, 341 F.3d 1387, 145 (2d Cir. 2003). Plaintiff's complaint adequately alleges Dr. Kelly's personal involvement in that he alleges she authorized the re-testing of plaintiff's specimen as well as the DNA test that was conducted by LabCorp. In addition, Dr. Kelly received the lab test results, interpreted then presumably in accordance with the FDNY policy that plaintiff challenges as

invalid under 4 C.F.R. Part 40, and reported the results to his superiors, resulting in his termination.

Accordingly, at this early stage of the litigation and liberally drawing all inferences in plaintiff's favor, he has satisfied the state action requirement for Section 1983 claims against Dr. Kelly. Whether or not Dr. Kelly is entitled to qualified immunity for her actions can not be determined on a motion to dismiss.

The City

Defendant City of New York argues that plaintiff's Section 1983 claims should be dismissed because he fails to allege any municipal policy or custom that precipitated his termination. In order to establish municipal liability under Section 1983, a plaintiff "must first prove the existence of a municipal policy or custom" and must then "establish a casual connection ... between the policy and deprivation of his constitutional rights. "Vippolis v. Village of Haverstraw, 768 F.2d 40, 43 (2d Cir. 1985), cert. denied 480 U.S. 916 (1987)

Where the plaintiff does not allege the existence of a formal policy "officially promulgated and adopted" by the municipality, Monell v. Dept of Social Servs. , 436 U.S. 658, 690 (1978), or a specific decision made by an official, who "possesses final authority to establish municipal policy with respect to the action ordered," Pembaur v. Cincinnati, 475 U.S. 469, 482 (1986) (plurality opinion), the plaintiff may "prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is `so permanent and well settled as to constitute a "custom or usage" with the force of law.'" St. Louis v.

Praprotnik, 485 U.S. 112, 127 (1985) (plurality opinion) (quoting Adickes v. S & H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

Liberally interpreting plaintiff's complaint, the second claim for relief alleges that the City violated his constitutional and federal rights by employing a drug testing policy that contains lower cutoff standards than those standards outlined by DoT in 49 C.F.R. 40. In addition, plaintiff alleges that if the City adhered to the standards set forth in 49 C.F.R. Part 40.87, his drug test result would have been negative and he would not have been terminated from his job as a fireman. Accordingly, plaintiff's complaint adequately alleges a municipal policy causally related to his termination.

Having established that at this stage of the litigation, the actions of the municipal defendants and the laboratories satisfies the first element of a Section 1983 claim, I know turn to the second element, the deprivation of a right secured by the Constitution or laws of the United States. Each of plaintiff's claims for denial of procedural due process, equal protection and violations of 49 C.F.R. Part 40 are reviewed in turn.

Procedural Due Process

"The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without due process of law." Meachum v. Fano, 427 U.S. 215, 223 (1976). In order to maintain a procedural due process claim, the plaintiff must "first identify a property right, second show that the state deprived him of that right, and third show that the deprivation was effected without due process." Local 42, L.I. Pub. Serv.

Employees v. Town. Bd. Of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994) (emphasis in original), citing Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990) (per curiam).

Property Right

The first element of a claim far relief for deprivation of procedural due process requires a showing by plaintiff that he has a constitutionally protected property right. Local 342, 31 F. 3d at 1194. "It is well-established that the Due Process Clause does not itself create the property interests that it protects." McMenemy v. City of Rochester, 241 F.3d 279, 286 (2d Cir. 2001). "Such property interests are 'created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" Luck v. Mazzone, 52 F.3d 475, 477 (2d Clr. 1995) (quoting Board o Regents v. Roth, 408 U.S. 564, 577 (1972)). The Supreme court has explained

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

McMenemy, 241 F.3d at 286 quoting Both, 408 U.S. at 577.

In this case, if plaintiff had a property interest in his employment, that interest must have arose under a contract with the FDNY guaranteeing a term of employment, or under New York law. See Baron v Port Authority of New York and New Jersey; 271 F. 3d 81, 89 (2d Cir. 2001) ("[A]t-will employment is not a

constitutionally protected property interest."). The parties do not contest that plaintiff had a property interest in addition, the parties have not asserted, nor does it appear to be the case, that plaintiff, in signing the Stipulation, forfeited his property interest in his employment and, as a consequence, the general. procedural protections that attend that interest. See Griffin v. Long island Railroad, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, *19, n.8 (E.D.N.Y. June 5, 1998); Medellin v. Chicago Transit Auth., 93-CV-6091, 1994 U.S. Dist. LEXIS 1037, (N.D. Ill. July 28, 1994). Furthermore, the facts alleged clearly indicate that the alleged actions of defendants led to plaintiff's termination. Accordingly, plaintiff's complaint satisfies the first two elements of a claim for relief for deprivation of procedural due process.

Due Process

Third element plaintiff must establish for a procedural due process claim is that he was deprived of his employment without due process. This element is not satisfied, as plaintiff waived his right to a hearing before and/or after termination for violating the Stipulation, signed by plaintiff on July 21, 1999. Paragraph 10 of the Stipulation states that "the finding of the presence of alcohol, marijuana or any other controlled substance in [plaintiff's] blood or urine will be deemed to be a violation of this agreement." (comp. Ex. A Par 10). Paragraph 14 of the Stipulation states:

> That Firefighter Thomas understands that, for the entire duration of his employment with the Department, in the event of any violation of this agreement ... from the date of this stipulation, he

> will be terminated without a hearing of any kind, and Firefighter [Thomas hereby waives any and all rights, including any right to a disciplinary hearing pursuant to sections 75 and 76 of the Civil Service Law, Article 78 of the civil Practice Law and Rules and any applicable collective bargaining agreement.

(Comp. Ex. B Par. 14.)[5] It is well settled that a public employee may waive his procedural due process protections. Miller v. Coughlin, 59 N.Y. 2d 490, 494 (1983); Abramovich v. Board of Educ., 46 N.Y.2d 450, 453, 455-57 (1979) ; Montiel v. Kiley, 538 N.Y.S. 2d 2, 4-5 (1st Dep't 1989) ; Thrift Associations Service Corp. v. De Buono, 680 N.Y. S.2d 746, 749 (3d Dep't. 1998) ; Security and Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO, on Behalf of Krom v. Hartnett, 500 N.Y.S.2d 571, 572 (3d Dep't 1986); Morrisroe v. Safir, 1998 WL 709822, 2 (S.D.N.Y. Oct. 9, 1998). This is particularly so when the waiver is "freely, knowingly and openly arrived at, without taint of coercion or duress." Montiel, 538 N.Y.S.2d at 4 (internal citations omitted). "A party may by contract waive his right to resort to the courts, but he will only be held to have done so if the waiver is explicit." Hartnett, 500 N.Y.S.2d. at 572. In addition, the New York State Court of Appeals in Abramovich explained that the waiver is valid where it "serves as the quid pro quo for countervailing benefits."' Abramovich, 45 N.Y.2d at 455. This holding was subsequently reaffirmed by the court in Matter of American Broadcasting Companies v. Roberts, 61 N.Y.2d 244 (1984), where the court stated that an employee may waive his right to procedural due process protections in those instances in which the waiver is predicated "upon the existence of a bona fide

agreement by which the employee received a desired benefit in return for the waiver ..." Matter of American Broadcasting Companies v. Roberts, 61 N.Y.2d 244, 249-58 (1984).

In this case, plaintiff's Stipulation explicitly waives his right to a pre- and/or post-termination hearing. Plaintiff makes no allegations that he signed the Stipulation under duress, coercion or without knowledge of the consequences moreover, in return for signing the Stipulation, plaintiff was able to retain his position as an employee of the FDNY. Having waived his rights to procedural due process, plaintiff cannot now complain that he was denied due process. Therefore, plaintiff's procedural due process claims are dismissed.

Equal Protection

In his second claim for relief, plaintiff also asserts that defendants deprived him of "equal protection of the law through their misrepresentations and their denial of plaintiff's right to a fair hearing." (Comp. at 15.) Liberally interpreting plaintiff's complaint, he alleges that defendants treated him, as an employee of the FDNY, differently than other `safety-sensitive" employees whose drug samples are tested under the more lenient DOT standards outlined in 49 C.F.R. Part 40.

The Equal Protection Clause of the Fourteenth. Amendment is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985) ; see also Harlen Assocs. Inc. v. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001). For a claim of

selective treatment to succeed, a plaintiff must show (1) that he was selectively treated compared to others who were similarly situated and (2) that his selective treatment was based on impermissible considerations such as race, religion, or an intent to inhibit or punish the exercise of constitutional rights. Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000). Where, as here, the classification is not based on a suspect or quasi-suspect class nor implicates a fundamental constitutional right, the challenged conduct is analyzed under the rational basis test. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). The rational basis test is appropriate here because employees of the FDNY do not constitute a suspect class and governmental employment is not a fundamental right. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Russo v. White, 775 F. Supp. 639, 646 n.5 (S.D.N.Y. 1991).

Under the rational basis test, the classification does not violate equal protection "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 319-20 (1993). Although nowhere in plaintiff's complaint does he allege that other safety-sensitive employees in New York are subject to the drug testing standards set forth in 49 C.F.R. Part 40, even assuming they are, a court must assume that the FDNY's action is constitutional under the rational basis test. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The state's action "must be upheld against equal protection challenge if there is any reasonable state of facts that could provide a rational basis for the classification." Center for Reproductive Law and Policy v. Bush, 304 F.3d 183, 197-98 (2d Cir. 2002) (citing

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001)).

Thus, the question is whether there is a reasonable basis for the difference in the drug testing policy applied to FDNY employees and other safety-sensitive employees. A reasonable basis is one that is "not arbitrary" and that is based "upon some ground of difference haying a fair and substantial relation to the object of the [regulation], so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). Here, a more stringent standard applied by-the FDNY is not arbitrary or unconstitutional, as it is completely rational for the City to adopt a more strict standard in reviewing drug tests of FDNY employees than is applied to other City employees whose positions do not involve such high stakes or safety risks. Accordingly, plaintiff's equal protection claims are dismissed with leave to replead. See Hughes v. City of Chicago, 2003 WL 21515592, *4 (N.D. Ill. 2003).

Moreover, even if plaintiff intends to bring his equal protection claim not based on his membership in a class of FDNY employees but rather on a "class of one" equal protection violation theory, his claims must still be dismissed with leave to replead. The Supreme Court has "recognized successful equal protection claims brought by a `class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citing

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Ctr., 488 U.S. 336 (1989)). To prevail on a "class of one" claim, plaintiff must allege "irrational and wholly arbitrary" acts and "intentional, disparate treatment." Giordano v. City of New York, 274 F. 3d 740, 751 (2d Cir. 2001) (quoting Olech, 528 U.S. at 564).

Assuming plaintiff is bringing "class of one" claims, it is impossible to determine from his complaint what he alleges was the basis for his selective treatment. Facts in the complaint hint at the possibility that he was selectively treated based on his race, his alleged disability, or that defendants retaliated against him for filing an EEOC claim, or simply a bad faith intent to deprive him of his job. However, such hints fall short of a reasonable inference. In addition, presuming plaintiff satisfies that burden of the equal protection claim, he fails to allege any facts indicating he was treated differently than others similarly situated. Nowhere in plaintiff's complaint does he mention other firemen who underwent random drug testing were treated differently by any of the laboratories, the City of New York, Dr. Kelly or the UFA. Accordingly, if in fact plaintiff intends to bring "class of one" equal protection claims, they are dismissed with leave to replead.

49 C.F.R. Part 40

Interpreting plaintiff's complaint in the most liberal fashion possible, and driving every inference in his favor, it appears that he intends to bring a Section 1983 claim for the violation of the standards set forth in 49 C.F.R. Part 48. Section 1983 itself creates no substantive rights; it provides only a procedure for

securing redress for the deprivation of rights established elsewhere. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). Accordingly, the relevant inquiry is whether 49 C.F.R. Part 40 establishes rights, violations of which allow an individual to bring a Section 1983 action.

As previously noted, 4 C.F.R. Part does not provide far private claim for relief for individuals seeking the enforcement of its provisions. However, the provisions may still form the basis of a Section 1983 claim. See Griffin v. Long Island Railroad, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, *27 (E.D.N.Y. June 5, 1998). A provision conferring substantive rights but not a private right of action does not necessarily leave its beneficiaries without a private remedy. "[U]nlike the inquiry into whether a substantive statute confers a direct private right of action, the § 1983 inquiry begins with a presumption in favor of the right to bring suit, for the general rule is that § 1983 provides a remedy for violations of federal statutory rights unless Congress has affirmatively withdrawn the remedy." Chan v. City of New York, 1 F.3d 96, 103 (2d Cir. 1993) (citations omitted). It is well settled that Section 1983 may be available as a vehicle for remedying violations of federal. statutes as well as constitutional violations, and there are "a number of cases that have allowed a regulation, read in conjunction with the statute under which it was promulgated, to convey a right enforceable under § 1983." Griffin, 1998 U.S. Dist. LEXIS 19336, *28-37 (collecting cases).

However, whether the violation of a regulation alone can form the basis of a Section 1983 action is a question of some novelty. See Id. (identifying cases and

discussing three Supreme Court cases, Upright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987) ; Wilder v. Virginia Hosp. Assn, 496 U.S. 498 (1990); Suter v. Artist M., 543 U.S. 347 (1992), which have left the question open to debate). The analysis in this action is informed by an earlier case in this court that reviewed the issue with respect to 49 C.F.R. Part 40.

In Griffin, Judge Ross dealt with 49 C.F.R. Part 40.33, which requires notice of the right to request that another laboratory analyze the sample yielding a positive result and mandates the transmission of the sample for that purpose where the employee has made the request within the prescribed time limit. After thorough analysis, Judge Ross found that because the regulation was "sufficiently moored to the statute under which it was promulgated ... [it did not] purport to create a right not intended by the enabling statute." Griffin, 1998 U.S. Dist. LEXIS 19336, *36-37. In addition, Judge Ross found that "the case for a cause of action under § 1983" was strengthened by the fact that the regulation was "informed by concerns that grow out of due process requirements." Id.

It is important to note here that a violation of a federal right, not simply a federal law, is required to form the basis of a Section 1983 action. See Blessing v. Freestan, 520 U.S. 329, 340 (1997) (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989). The Supreme Court in Blessing identified a three-prong inquiry to employ when determining whether a particular provision gives rise to a federal right:

> First, Congress must have intended that the

> provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 344-341.

Employing the three-pronged inquiry, Judge Ross found that the notice provision of 49 C.F.R. Part 40.33 (1) was clearly intended to benefit employees, (2) embodied both obligations and what was required to fulfill those obligations, and (3) that the "determination whether there has been a deprivation would not strain judicial competence." Griffin, 1998 U.S. Dist. LEXIS 19336, *37-51.

In finding that 49 C.F.R. Part 40.33 is intended to benefit employees, Judge Ross relied in part on due process concerns. highlighted by Judge Patterson's reasoning in Burka v. New York City Transit Atith., 739 F. Supp. 814 (S.D.N.Y. 1990). The context of the present case is similar to that presented in Judge Patterson's decision and Judge Ross' decision; an employee with a protected property interest in his employment faces termination on the basis of the report of a laboratory that tested his urine specimen and found that it contained a controlled substance. Judge Patterson noted that in such a situation, without notice and the right of access to the original sample, the

employee is deprived of a meaningful opportunity to challenge the validity of the positive test result. Burka, 739 F. Supp. At 839-42. Thus, Judge Ross concluded, "the due process concerns that may call for a meaningful opportunity to challenge the evidence that is the basis of a dismissal are consistent with the conclusion that federal law - that is, the statutory and regulatory provisions at issue here - secures for the employee the right to notice and access to the specimen for independent testing." Griffin, 1998 U.S. Dist. LEXIS 1933, *46.[6]

In this case, plaintiff alleges that defendants violated 49 C.F.R. Part 40, et seq., by failing to properly store his specimen, failing to maintain a chain of custody, failing to adhere to privacy standards, and by employing an excessively low cutoff standard for the testing of morphine. With respect to the testing and storage procedures outlined in 49 C.F.R. Part 40.33, I conclude as did Judge Ross that this provision is intended to benefit employees. The Testing Act, under which the regulations were promulgated, focuses broadly on drug and alcohol testing as a means of protecting public safety. See Drake v. Delta Airlines, 923 F. Supp. 357, 392 (E.D.N.Y. 1996). However, the findings that preface the Testing Act indicate that Congress was also sensitive to the concerns of employees. [7] The Testing Act included a provision specifically directing the Secretary of Transportation, in making rules and regulations governing drug testing and treatment of those testing positive, to:

> develop requirements which shall ... provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual

> and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a 2d confirmation test done independently at another certified laboratory if the individual requests the 2d confirmation test not later than 3 days after being advised of the results of the first confirmation test.

4 U.S.C. § 20140(c)(5). Pursuant to this provision, DOT promulgated 49 C.F.R. Part 40.33. In addition, just as inadequate notice and the lack of a re-testing opportunity interferes with an employee's ability to defend himself, improper storage and breaks in the chain of custody of a specimen likewise interfere with an employee's ability to defend himself in that the specimen itself is denatured or not available for re-testing - which by extension amounts to a denial of due process.

However, assuming but not deciding that the City - and the laboratory defendants acting as instruments of the government - are bound by the DOT regulations, plaintiff's Section 1983 claims against them for violating the testing and storage procedures must be dismissed with leave to replead. In order to hold municipal defendants liable under a Section 1983 action, plaintiff is required to establish that the violations occurred pursuant to an established policy, practice or custom, or that a high official was directly involved in the mishandling of his specimen. See Monell v. Department of Social Services of the City of New York, 436 U.S.

558, 694 (1978). Because plaintiff's complaint does not allege any such facts, his Section 1988 claims for violations of the DOT testing and storage procedures are dismissed with leave to replead.

However, it can be inferred from the facts alleged in the complaint that the FDNY publication of plaintiff's suspension due to drug violations (i.e., his violation of privacy or liberty interests) and the use of drug cutoff standards that are more strict than that imposed by DOT, were actions taken pursuant to a policy, practice or custom. The inquiry does not end there, however.

With respect to plaintiff's claim for relief against the defendants for employing drug testing cutoff standards that are more strict than the DOT regulations, I conclude that the DOT provisions outlining cutoff measures are not intended to benefit employees. While the specific sections should be examined in light of the entire legislative scheme, see Marshall v. Switzer, 10 F.3d 925, 928 (2d Cir. 1993), a comprehensive statutory scheme can include some provisions that protect individuals and some that do not. See e.g., Blessing, 520 U.S. 329 (1997). Common. sense dictates that measure by which a safety-sensitive employee's drug test is determined to be positive or negative is for the benefit of the public, not the employee. Accordingly, these provisions of the DOT regulations do not provide a federal right by which plaintiff can bring a Section 1983 action, and his claims for said violations are dismissed without prejudice.

Plaintiff's claim for violation of his liberty or privacy interests as protected by the DOT regulations, brought under Section 1983 against the City, must also be

dismissed.[8] Unlike the drug cutoff standards, common sense indicates that privacy provisions are for the benefit of the employee, not the public. The Testing Act includes a provision specifically directing the Secretary of Transportation, in making rules and regulations governing drug testing and treatment of those testing positive, to:

> develop requirements which shall provide for the confidentiality of test results and medical information (other than information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section.

49 U.S.C. § 20140(c)(7). In addition, the findings that preface the act indicate a concern for an employee's privacy: " [A] dequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right of privacy." Pub. L. 102--143, § 2(6), 105 Stat, 953 (1992). However, plaintiff's liberty interests affected by publication of private information are only affected if there are consequences that flow from the publication. Cf. Paul v. Davis, 424 U.S. 693 (1976) ; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 925 (1972); Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991). Here plaintiff alleges no such consequence. Accordingly, the liberty or privacy interest claim for relief must also be dismissed with leave to replead.

Third Claim for Relief: RICO Violations

Plaintiff's third claim for relief alleges defendants

violated 18 U.S.C. § 1962 "through testing and retesting [his] urine specimen, by falsely reporting by telephone and facsimile to [his] employer positive drug results that actually were negative, by restricting [his] duties, by suspending [him] ... and publishing ... the contrived suspension." (Comp. at 17.) Defendants argue that plaintiff's RICO claims must be dismissed far failure to plead with particularity.

To state a claim under Section 1962(c), a plaintiff must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern, (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an `enterprise, (7) the activities of which affect interstate or foreign commerce." Moss v. Morgan Stanley, Inc., 719 F. 2d 5, 17 (2d Cir. 1983) see G-I Holdings, Inc. v. Baron, 238 F. Supp.2d 521, 537 (S.D.N.Y. 2002) ; Citadel Mgmt. , Inc. v. Telesi Trust Inc, 123 F. Supp.2d 133, 154 (S.D.N,Y. 2000) [9] Before a plaintiff can invoke RICO's civil remedies, the complaint must also allege "that he was `injured in his business or property by reason of a violation of section 1962.'" Id. (quoting 18 U.S.C. Sec. 1962)(emphasis in original).

In considering RICO claims, courts must attempt to achieve results "consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime." Unite States v. Porchelli, 865 F.2 1352, 1362 (2d Cir. 1989). "Because the mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." Schmidt v. Fleet Bank, 16

F. Supp. 2d 340, 346 (S.D.N.Y. 1998) (internal quotations and citations omitted). In ensuring that "RICO's severe penalties are limited to enterprises consisting of more than simple conspiracies to perpetrate the acts of racketeering ... courts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb." Id.

Defendants move to dismiss plaintiff's RICO claims on the grounds that they fail (1) to plead an "enterprise," (2) to allege a "pattern of racketeering," (3) to plead activities constituting predicate acts or to plead predicate acts of mail and wire fraud with particularity under Fed. R. Civ. P. 9(b), (4) to plead actual monetary damages proximately caused by the alleged RICO activity, (5) to allege a RICO conspiracy and (6) to plead facts which give rise to an inference of fraudulent intent.[10] Because plaintiff has failed to meet the initial requirement of pleading an enterprise, only that argument will be considered.

Section 1962(c) prohibits "any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962 (c) .Therefore, to establish liability under 19 2 (c) , the plaintiff must show "the existence of two distinct entities: (1) a `person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001)) ; see e.g. Panix Productions, 2002 WL 72982, *4 (S.D.N.Y. Jan. 17, 2002).

The RICO statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal. entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). Liberally interpreting plaintiff's complaint, he alleges the defendants are associated in fact.

In its seminal case on this issue, the Supreme court stated that "a group of individuals associated in fact" refers to a "group of persons associated together for a common purpose of engaging in a course of conduct" that "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). A racketeering enterprise must exhibit a "hierarchy, organization and activities and it must exhibit structural continuity which exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc, basis. " Panix Productions, 2002 72932, *4 (quoting Pavlov v. The Bank of New York Co. Inc., 135 F. Supp. 2d 426, 429-30 (S.D.N.Y. 2001)).

The plaintiff's allegations fall far short of this pleading standard. The complaint fails to allege the identity of the enterprise that the alleged racketeering activities are said to have furthered or explain how the enterprise or enterprises function as a continuing unit, providing a mechanism for directing the group's affairs. The complaint has "simply strung together all of the defendants ... and labeled the resulting group an association-in-fact enterprise." Nasik Breeding Research Farm, Ltd. v. Merck Co., Inc., 165 F. Supp.

2d 514, 539 (S.D.N.Y. 2001).

In Nasik, the court dismissed a complaint in which the plaintiffs merely stated in a conclusory fashion that the defendants "combined in an association-in-fact: that shared a common purpose, unity and identifiable structure." Nasik, 165 F. Supp. 2d at 539. Similarly, the court in Schmidt v. fleet Bank, 16 F. Supp. 2d 340 (S.D.N.Y. 1998), dismissed a complaint as inadequately pled where the plaintiffs failed to allege "any chain of command or functional integration, as is typical of classic RICO enterprises." Id. at 350. Here, plaintiff's complaint does not allege a RICO conspiracy or the purpose of any such conspiracy, much less provide a description of the overreaching `enterprise,' which the `pattern of racketeering activity' is supposed to be furthering. See Moy v. Terranova, No. 87-CV-1,575, 1999 WL 118773, *5 (E.D.N.Y. Mar. 2, 1999) (holding that allegations that defendants had ownership interests in a number of companies but otherwise failing to offer any allegations regarding the continuity or structure of the group, or how the entities joined together did not state a RICO claim). The only allegation in the complaint regarding any of the defendants is the conclusory allegation that "defendants engaged in more that two acts constituting a pattern of racketeering to exclude plaintiff from the Fire Department, a municipal corporation affecting interstate commerce." (Comp. at 17). Because plaintiff has failed to sufficiently plead the enterprise requirement, the RICO claim pursuant to 18 U.S.C. § 1962(c) is dismissed with leave to replead.[11]

Although it is not clear that plaintiff's complaint brings a claim for RICO conspiracy under Section 1962(4), to

the extent that it is alleged, it is dismissed. Section 1962(d) prohibits any conspiracy to violate Sectuib 1962(c). The dismissal of plaintiff's RICO claim leaves the conspiracy claim for relief without a basis. "Any claim under section 1962(d) based an conspiracy to violate the other subsections of section 1962 must fail if the substantive claims are themselves deficient." Discon, Inc. v. NYNEX Corp., 9 F. 3d. 1055 (2d Cir. 1996), rev'd on other grounds, 525 U.S. 128 (1998) (citation omitted) ; see also Mehrkar v. Schulmann, No. 99 Civ. 10974, 2001 WL 79901, at *6 (S.D.N.Y. Jan. 30, 2001) ("[b]ecause plaintiff's other RICO claims fail, the allegations in the amended complaint cannot set forth a conspiracy to commit such violations under § 1962 (d) ; Pyke v. Laughing, No. 92-CV-555, 1998 WL 37599, at *9 (N.D.N.Y. Jan 26, 1998) ("In light of the court's rulings herein that defendants have not stated a viable RICO claim under sections 1962(a), (b) or (c), their section 1962(d) conspiracy claim necessarily fails as well."). Plaintiff's claim for relief pursuant to 18 U.S.C. 9 1962(d), if any, is therefore dismissed without prejudice.

Fourth Claim for Relief: Disability Discrimination

Although the Preliminary Statement to plaintiff's complaint states that he is bringing the action, in part, pursuant to the American with Disabilities Act ("ADA"), (see Comp, Par. 6), plaintiff's fourth claim for relief specifically references Section 504 of the Rehabilitation Act of 1973, alleging he was "discharged because of his disability," (Comp. at 18).[12] Interpreting the complaint liberally, I assume that plaintiff intends to bring an employment discrimination claim against the City under both acts.

"The ADA has three separate titles: Title I covers employment discrimination, Title II covers discrimination by government entities, and Title III covers discrimination by places of public accommodation." PGA Tour, Inc. v. Martin, 532 U.S. 661, 691-692 (2001). Title III is not applicable to this action and Title I requires the exhaustion of administrative remedies before filing suit in federal court. Accordingly, I consider whether plaintiff's complaint adequately alleges a Title II ADA claim.[13] Neither Title II of the ADA nor Section 504 of the Rehabilitation Act requires a complainant to exhaust administrative remedies prior to filing suit.[14] See Sworn v. Children's Western New York Children's Psychiatric Center,269 F. Supp. 2d 152, 158 (W.D.N.Y. 2003) ; Shariff v. Artuz, 2000 WL 1219381, *3 (S.D.N.Y. Aug. 28, 2000) (Chin, J. ; Henchey v. Town of North Greenbush, 831 F. Supp. 960, 968 (N.D.N.Y. 1993) (collecting cases); Finley v. Giacobbe, 827 F.Supp. 215, 219 (S.D.N.Y. 1993) ("There is no requirement under the Rehabilitation Act that nonfederal employees exhaust administrative remedies.").

Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, Section 504 of the Rehabilitation Act states, in relevant part, that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or

activity receiving Federal financial assistance." Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794. "Significantly, Title II of the ADA, which covers state and local government entities, applies to employees of such entities who are not cowered under the Rehabilitation Act (i.e., not working in programs receiving federal funding), and claims brought under Title II will be analyzed under the same standards a those brought under Title I of the ADA. "Frank S. Ravitch, Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for workplace harassment Under the Americans with Disabilities Act, 15 Cardozo L. Rev. 1475, n.74 (1994). Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, claims brought under both can be consider in tandem. Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999) ; see also Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) ,

The United States Supreme Court recently held that in an employment discrimination suit, the complaint need not establish a prima facie case of discrimination, but need only to comply with Rule 8(a)(2) and provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002) (quoting Fed. Rule Civ. Pro. 8(a)(2)) (abrogating Tarshis v. Riese Organization, 211 F . 3d 30 (2d Cir. 2000) ; see Gmurzynska v. Hutton, 355 F.3d 206 (2d Cir. 2004) (per curiam) (acknowledging the liberal pleading standards reaffirmed in Swierkiewicz). At the pleading stage, "before the reception of any evidence either by affidavit or admissions,...[tlhe issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to

support the claims." Id. at 511 quoting Scheuer v. Rhodes, 416 U.S. 232, 236 1974 .

The City argues that plaintiff is not "disabled" under the acts. For the purposes of disability discrimination claim, the term "disability" includes "[a]ny mental or psychological disorder, such as ... emotional or mental illness." 29 C.F.R. 1630.2(h) (2001). Specifically, a person with a disability is an individual with a physical or mental impairment that substantially limits one or more of the major life activities of such individual, or an individual regarded as having such an impairment.[15] 42 U.S.C. Sec. 12102(2); 29 U.S.C. § 705(20)(B). Accordingly, the acts protect from discrimination "not only those who in fact suffer from a disability, but also those who are perceived by their employers as suffering from a disability, even if the perception is incorrect." Peters v. Baldwin Union Free School Dist., 320 F . 3d 164, 168 (2d Cir. 2003).

Plaintiff alleges that at all times relevant to this suit, he was under the care and treatment of a psychiatrist, Dr. Richard G. Dudley, Jr., and that he was discharged because of his disability. (Comp. at 18.) Dr. Dudley treated plaintiff for job-related stress, prescribing the anti-depressant Zoloft, beginning as early as the summer of 1999. (Comp. Pars. 28, 32.) Liberally interpreting plaintiff's complaint, it appears his alleged disability is "Adjustment Disorder with mixed anxiety and depression as a result of psychological stressors, most of which are job related." (Comp. Par. 31.) Plaintiff also alleges that the fire department knew of his alleged disability. Dr. Dudley twice wrote to the fire department requesting medical leave on plaintiff's behalf, (see Comp. Pars. 30-31), and plaintiff alleges

that the fire department diagnosed his job-related stress and chest pains on at least seven occasions between May 1999 and March 2000, (see Comp. Par. 34). In addition, plaintiff includes as an exhibit to the complaint a Fire Department injury report, dated November 12, 1989, indicating plaintiff was suffering chest pains, shortness of breath and wheezing. (see Comp. Ex. B.) Accordingly, plaintiff more than adequately alleges he suffers a disability covered by the acts. It is for a jury to decide whether or not his disability substantially limits a major life activity, or whether the FDNY perceived that it did. See Peters v. Baldwin Union Free School Dist., 320 F. 3d 164, 168 (2d Cir. 2003).

Plaintiff's complaint for disability discrimination against the City adequately alleges: (1) he is an individual with a disability within the meaning of the ADA and the Rehabilitation Act; (2) he is otherwise qualified to perform as a firefighter; (3) he was terminated because of his disability; and (4) the FDNY receives federal funding. Accordingly, the City's motion to dismiss the disability discrimination claims is denied.

Private Entities

Although plaintiff generically refers to "defendants" in his fourth claim for relief, he does not allege that at any time during the actions giving rise to this suit that he was employed by the UFA, Quest, B&S or LabCorp. Plaintiff does not allege that any of these defendants receive federal funding or qualify as a public entity. In addition, plaintiff does not allege that at any time defendants UFA, Quest, B&S or LabCorp were aware of his alleged disability, or perceived him to be disabled.

Thus, even construing plaintiffs complaint as liberally as possible, it fails to state a claim for disability discrimination against the UFA, Quest, B&S and LabCorp. Accordingly, the claims for violations of the Rehahilitation Act and the ADA against CFA, Quest, B&S, and LabCorp are dismissed with leave to replead.

Dr. Kelly

Pursuant to the 1992 amendment of the Rehabilitation Act, which incorporates the standards applied under the ADS., individuals cannot be held personally liable.[16] 29 U.S.C. 794 (d) ; see Garcia v. S. U. N. Y. Health Sciences Center of Brooklyn, 280 F.3d 98, 107 (2d. Cir. 2001). Therefore, plaintiff's claims of disability discrimination against Dr. Kelly are dismissed.

Breach of Fair Representation Claim Against Defendant UFA

Although not asserted in one of the enumerated claims for relief, plaintiff's complaint asserts a breach of fair representation claim against defendant UFA. Specifically, paragraph eight of the complaint states: "This action is brought against the UFA for its bad faith conduct and its for [sic] breach of fair representation pursuant to 28 U.S.C. § 1331 and 28 . (Comp. Par. 8.) A state law breach of fair representation claim can be brought under Section 203 of the New York State Civil. Service Law, which states: "Public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances

arising thereunder." McKinney's Civil Service Law § 203.

UFA urges this Court to dismiss this claim as a matter of law, or in the alternative, to decline to assert supplemental jurisdiction over the claim. Breach of fair duty of representation occurs when a union's conduct toward a member is arbitrary, discriminatory or in bad faith. Civil Service Bar Assoc., Local 237, International Brotherhood of Teamsters v. City of New York, 64 N.Y.2d 188, 196 (1994). Conduct that is irresponsible or grossly negligent may not constitute a violation of the duty of fair representation. Civil Service Employees Assoc., Inc. v. Public Employment Relations Board, 133 A. D. 2d 430, 432 (3d Dep't 1987). Plaintiff's complaint alleges that he made numerous unheeded requests for assistance to the UFA. Defendant UFA, in its motion papers, disputes the merits of this assertion by referencing UFA Bronx Trustee Robert Straub's affidavit, submitted in support of the UFA' motion.

However, an analysis of the merits of plaintiff's allegations is premature, as plaintiff need only provide "a short and plain statement of the claim shoving that the pleader is entitled to relief" at this stage. Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002).

Nevertheless, as all the federal claims against defendant UFA have been dismissed, I decline to exercise supplemental jurisdiction over this claim and accordingly, dismiss it without prejudice. Although plaintiff has been given leave to replead the majority of his claims, it is unlikely he will be able to sufficiently plead UFA's role with respect to the drug testing standards and the employment decisions that form the

foundation of his federal claims. While the statute governing supplemental jurisdiction, 28 U.S.C. § 1367, does not require dismissal of pendent state-law claims where all of the federal claims have been dismissed, the exercise of pendant jurisdiction is discretionary. United Mine Workers v. Gibbs, 383 U.S. 71.5, 726-27 (1966). In determining whether a district court shall exercise supplemental jurisdiction over state claims pursuant to 28 U.S.C. § 1367(a), the court must decide whether the state claims are so related to the federal claims that they arise from a "common nucleus of operative fact" and are so related that plaintiff would be expected to try all claims in one proceeding. People by Abrams v. Terry, 45 F. 3d 17, 23, n. 7. (2d Cir. 1995).

Plaintiff's allegation that defendant UFA wrongfully failed to file a contractual grievance of plaintiff's dismissal is not sufficiently related to the claims against the codefendants - that they failed to adhere to the federal drug testing standards provided by 49 C.F.R. Part 40, and wrongfully discriminated against him, in employment decisions - to justify supplemental jurisdiction. The facts necessary to prove plaintiff's federal, claims are not similar to the facts necessary to prove the breach of fair representation claim. Accordingly, plaintiff's state law claims are dismissed without prejudice See Marcus v. AT&T Corp., 1 38 F. 3d 46, 57 (2d Cir. 1998)("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well.") (internal citations omitted).

CONCLUSION

For the reasons set forth above, (1) plaintiff s claim for

relief under Title VII of the Civil Rights Act of 1964 is dismissed with leave to file an amended complaint alleging compliance with the exhaustion requirements of the statute; (2) all claims against defendant FDNY are dismissed; (3) plaintiff's claim for relief pursuant to 4 U.S.C. Sec. 1985 is dismissed with leave to replead; (4) plaintiff's claim for relief pursuant to 42 U.S.C. § 1983 is dismissed with leave to replead except with respect to plaintiff's procedural due process claim which is dismissed with prejudice; (5) plaintiff's RICO claims are dismissed with leave to replead; (6) plaintiff's claims of disability discrimination against defendants other than New York City are dismissed with leave to replead except Dr. Kelly as to whom the claims are dismissed with prejudice; (7) plaintiff's breach of fair representation claims against defendant UFA are dismissed without prejudice. Any amended pleadings shah. address the deficiencies discussed in this opinion, comply with the strictures imposed on attorneys by Rule 11 of the Federal Rules of Civil Procedure and be filed within forty-five (45) days of the date of this opinion.

The Clerk is directed to mail a filed copy of this opinion to the attorneys for all parties and to the magistrate judge.

Footnotes

fn1In 1991, Congress passed the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTFTA"), which, among other things, amended the Federal Aviation Act, Federal Railroad Safety Act, and Commercial Motor Vehicle Safety Act to require drug testing for transportation employees in safety sensitive

positions. See Federal Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992). FOTETA requires mandatory pre-employment, reasonable suspicion, post-accident, and random drug testing of covered aviation, railway, commercial motor carrier, and mass transit transportation workers. Id. FDTETA and the Department of Transportation ("DOT") regulations promulgated pursuant to FOTETA apply to "transportation employers, safety sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents." C.F.R. 40.1.

fn2The DOT regulations for "safety sensitive positions" specifies a 2000 ng/ml cutoff concentration level for morphine in 49 C.F.R. § 40.87.

fn3 A litigation package is apparently a collection of portions of the original specimen to be used in litigation when test results are in dispute. Cf. 49 C.F.R. § 40.365 (laboratory falsification, concealment or destruction of "documentation concerning any part of the drug testing process, including, but not limited to, documents in a 'litigation package," are examples of serious noncompliance).

fn4 The letter was dated March 4, 2003, postage meter stamped March 15, 2003 and post marked March 18, 2003.

fn5 "Section 75 [of the Civil Service Law) states that a covered employee 'shall not be removed or otherwise subjected to any disciplinary penalty provided in this

section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." Ciambriello v. County of Kassau, 292 F.3d 307, 314 (2d Cir. 2002), citing N.Y. Civ. Serv. L. §§ 75(1) (McKinney 1999). Section 75 "gives covered employees a property interest in their employment, so that they may not he terminated without notice and hearing." Id., citing O'Neill v. City of Auburn, 23 F.3d 685, 688 (2d Cir.1994). "Section 75 rights, however, may be modified or replaced by a collective bargaining agreement." Id., citing N.Y. Civ. Serv. Law § 76(4) McKinney 1999).

"[U]nder New York law, Article 78 is a foam of proceeding available to compel public officials to comply with their responsibilities." Vandor, Inc. v. Militelio, 301 F.3d 37, 39 (2d Cir. 2002). An Article 78 proceeding can be brought by a terminated civil servant challenging his/her termination and seeking reinstatement. Curtis v. Board of Educ. of Lafayett Cent. School Dist., 487 N.Y.S.2d 439, 447 (4th Dept. 1985). The statute of limitations for instituting such a petition is generally four months. Vandor, 301 F.3d at 39, citing N.Y. C.P.L.R. Sec. 217(l).

fn6 A due process claim based on DOT regulations was also raised in English v. Talladega County Bd. Of Educ., 938 F. Supp. 775 (N.D. Ala. 1996). However, relying on Eleventh Circuit precedent, that court found that although the employee was deprived of procedural safeguards guaranteed by DOT regulations, the state's procedures were adequate to protect plaintiff's property right. English, 938 F. Supp. at 783.

fn7For example, the findings, in relevant part, state;

> [A]dequate safeguards can be implemented to ensure that testing for abuse of alcohol or use of illegal drugs is performed in a manner which protects an individual's right of privacy, ensures that no individual is harassed by being treated differently from other individuals, and ensures that no individual's reputation or career development is unduly threatened or harmed.

Pub. L. 102-143, Sec. 2(6), 105 Stat. 953 (1992).

fn8 I infer plaintiff's privacy action to be alleged against the City and not the other defendants. Plaintiff does not allege any facts from which it can be inferred that the other defendants violated his privacy rights. The only alleged fact raising such an inference is the FDNY's publication of plaintiff's suspension due to drug violations. Accordingly, the claim is dismissed with leave to replead as to the other defendants, if it indeed was intended to be brought against them.

fn9 section 1962(c) states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c)

fn10 Federal Rule of Civil Procedure 9(b) requires that

a complaint alleging fraud or mistake be plead with particularity. "in the RICO context, Rule 9(b) calls for the complaint to specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, []identify those responsible for the statements ...[and] allege facts that give rise to a strong inference of fraudulent intent." Moore v. PaineWebber Inc., 189 F.3d 165, 173 (2d Cir. 1999) (internal quotations and citations omitted).

fn11 Defendants' other grounds for dismissal of the RICO claim will be considered if and when an amended pleading is filed and a motion to dismiss follows.

fn12 plaintiff's fourth claim for relief states: "Defendants violated 29 U.S.C. § 794 in that plaintiff at all times relevant was under the care and treatment of a psychiatrist, that plaintiff was qualified and capable of performing the duties of his position as Firefighter 1st Grade, that plaintiff was discharged because of his disability, that defendant Fire Department received Federal financial assistance," (Comp. at 18.)

fn13 Title I is not the exclusive remedy for employment discrimination under the ADA. Title I of the ADA protects qualified individuals with disabilities against employment discrimination in areas such as application procedures, hiring, promotions, compensation, training, and termination. See 42 U.S.C. § 12112(0). Title II, in comparison, provides that "no qualified individual. with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such. entity." 42 U.S.C. § 12132 (emphasis added). Although the Second Circuit has not yet resolved the issue of whether an employee of a public entity may bring an employment discrimination claim under Title II, district courts in this circuit have concluded that such a claim is permitted. See Bloom v. New York City Bd. of Educ. Teachers' Retirement System of City of New York, 2003 wL 1740528, *10-11 (S.D.N.Y. Apr. 2, 2003) (Pitman, M.J.); see also Simms v. City of New York, 160 F. Supp,2d 398, 400 n.1 {E.D.N.Y. 2001) ; Rome v. MTAINew York City Transit, 1997 WL 1048908, *5 (E.D.N.Y. Nov. 18, 1997) (Gleeson, J.); Craboski v. Giuliani, 937 F. Supp. 258, 269 (S.D.N.Y. 1996). "Moreover, other circuits have concluded that Title II permits an employment discrimination claim against a public entity." Bloom, 2003 wL 1740528, *11 (citing Bledsoe v. Palm Beach County Soil and Water Conservation BisL., 133 F.3d 816, 820 (11th Cir.1998) ; Doe v. Univ. of Md. Med. ys. Coma., 50 F.3d 1261, 1264-65 (4th Cir.1995). But see Zirtunerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir.1999) (finding that Title II was not applicable in the employment context). Research has disclosed no authority in this circuit reaching a contrary result.

fn14 Although plaintiff's complaint mentions the filing of an EEOC complaint, drawing all inferences in favor of plaintiff, it appears to be in response to the racial. epithets from Captain Blume, rather than in response to plaintiff's termination. In addition, the complaint alleges the FDOC complaint was filed in February 2000, well before plaintiff's termination.

Fn15 "Major Life FActivities means functions such as

oaring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," 45 C.F.R. § 84.3(j)(2)(ii); 29 C.F.R. § .1630.2(i).

Fn16 Neither the Rehabilitation Act nor Title IT of the ADA bars a suit against state officials in their official capacities for injunctive relief. See Henrietta D. v. Bloomberg, 331 F.3d 261, 287-88 (2d Cir. 2003). However, plaintiff's complaint against Dr. Kelly seeks only monetary damages.

Filed 3/17/2009
No. 07-3498-cv
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
LAUDE W. THOMAS,
Plaintiff-Appellant,
v.
CITY OF NEW YORK, BENDINER AND SCHLESINGER, QUEST DIAGNOSTICS INCORPORATED, LABORATORY CORPORATION OF AMERICA HOLDINGS AND KERRY KELLY, M.D.,
Defendants-Appellees,
UFA UNIFORM FIREFIGHTERS ASSOCIATION AND THE NEW YORK CITY FIRE DEPARTMENT,
Defendant.

ORDER

Appellant, Claude W. Thomas, having filed a petition for panel rehearing, or, in the alternative for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

OPPOSITION BRIEF

(2)

No.: 08-1556

Supreme Court, U.S.
FILED
AUG 5 - 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CLAUDE W. THOMAS, PETITIONER

v.

CITY OF NEW YORK, BENDINER AND SCHLESINGER,
QUEST DIAGNOSTICS INC., LABORATORY CORP. OF AMERICA HOLDINGS,
UFA UNIFORM FIREFIGHTERS ASSOC., AND KERRY KELLY, M.D.,

OPPOSITION OF LABORATORY CORP. OF AMERICA HOLDINGS TO CLAUDE W. THOMAS' PETITION FOR A WRIT OF CERTIORARI

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TO BE REPRINTED

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SCOPE OF LABCORP'S OPPOSITION TO THE PETITION

Thomas' Petition for a Writ of Certiorari ("Petition") presents four questions for the Court's review, only one of which is relevant to the trial court's dismissal of the claims against LabCorp. The first three issues presented by Thomas question the validity of a stipulation entered into by Thomas and whether his firing was a denial of equal protection and due process. These issues do not impact LabCorp. Only the fourth issue – whether the Second Circuit's use of an unpublished, summary order to affirm the dismissal of Thomas' claims against LabCorp violated his equal protection and due process rights– has the potential to impact LabCorp and LabCorp's opposition to Thomas' Petition is limited to opposing Thomas' request for the Court's review of this single issue.[1]

COUNTER-STATEMENT OF THE CASE

Petitioner Claude Thomas ("Thomas"), a former firefighter with defendant New York City Fire Department ("FDNY"), tested positive for a controlled substance in violation of a stipulation and agreement he executed with the FDNY. (36a).[2] As a result, he was terminated on December 4, 2002. (38a). Subsequently, Thomas requested that defendant Laboratory Corporation of America Holdings

[1] Because LabCorp's opposition to the Petition is limited in scope, LabCorp will not burden the Court with a lengthy counter-recitation of the facts. LabCorp however, reserves all rights to dispute the facts as presented in the Petition in any future filings with the Court.

[2] All citations of the form "__a" refer to the Appendix attached to Thomas' Petition.

("LabCorp") be permitted to conduct a DNA assay to match Thomas' urine specimen with a DNA sample obtained from him and to re-test the specimen that had originally tested positive for morphine by defendants Bendiner & Schlesinger ("B&S") and Quest Diagnostics ("Quest"). (38a-39a). Because the urine specimen contained an insufficient amount of DNA, LabCorp advised Thomas that it was unable to confirm that the specimen belonged to Thomas, and did not confirm whether the urine specimen contained morphine. (39a).

On or about April 14, 2003, Thomas filed a complaint ("Complaint") against The City of New York (the "City"), the FDNY, B&S, Quest, LabCorp, UFA Uniform Firefighters Association ("UFA") and Kerry Kelly, M.D. ("Dr. Kelly") (collectively "Defendants"). (40a). The original Complaint alleged four distinct causes of action against the Defendants.

First, Thomas claimed a violation of 42 U.S.C. §1985, alleging that the conspired to injure him and deprive him of his employment in contravention of the requirements of 49 C.F.R. Part 40, the Department of Transportation ("DOT") drug testing regulations. Second, Thomas contended that the Defendants, while acting under color of state law, deprived him of his right to procedural due process and equal protection of the law in violation of 42 U.S.C. §1983. Third, Thomas alleged that the Defendants violated 18 U.S.C §1962 ("RICO") by falsely reporting Thomas' positive drug test and terminating him as a result. Fourth, Thomas

contended that the FDNY terminated him because of a disability in violation of 29 U.S.C. §794 (the "Rehabilitation Act"). (40a).

LabCorp moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure (the "Rules") 12(b)(6) for failure to state a claim upon which relief could be granted. In a Memorandum and Order dated April 1, 2004 (86a), Senior Judge Charles P. Sifton granted LabCorp's motion to dismiss but permitted Thomas leave to replead his claims. Judge Sifton further required that "[a]ny amended pleadings shall address the deficiencies discussed in [the] opinion, comply with the strictures imposed upon attorneys by Rule 11 of the Federal Rules of Civil Procedure . . . ." (135a).

After the interim filing of two amended complaints, Thomas filed a third amended complaint (the "Third Amended Complaint"). Notably, the Third Amended Complaint was unsigned in violation of F.R.C.P 11(a). (42a-43a). The Third Amended Complaint failed to specifically delineate causes of action and merely stated that "the defendants' said acts and omissions as set forth above, constitute violations of §§1983, 1985 and New York State Executive Law §290."

In its November 19, 2004 Memorandum and Order, the District Court granted LabCorp's second Rule 12(b)(6) motion and dismissed all claims against LabCorp. (33a). The court construed Thomas' Third Amended Complaint to assert two causes of action against LabCorp, a claim pursuant to 42 U.S.C. § 1985

and a claim under 42 U.S.C. § 1983.. (41a). The District Court dismissed the §1985 claim on several grounds, including: (1) Thomas' failure to identify a predicate constitutional or federal statutory right of which LabCorp allegedly conspired to deprive him (48a), (2) the Third Amended Complaint's failure to allege that LabCorp even knew Thomas was African-American, which is a requirement to prevail on a discrimination claim based on race (49a). The District Court also dismissed Thomas' § 1983 claim, finding that Thomas failed to assert that LabCorp' s alleged misconduct (i.e., losing and/or mishandling of the urine specimen) occurred pursuant to an established policy, practice or custom, or directly involved a high official. (62a). Additionally, the Court found that Thomas failed to allege facts sufficient to support predicate claims for deprivation of procedural due process or equal protection. (51a).

In an unpublished summary order dated January 7, 2009, the Second Circuit Court of Appeals affirmed the trial court's dismissal of the claims against LabCorp. (1a). On March 17, 2009, the Second Circuit denied Thomas' Motion for a Rehearing en banc.

REASONS TO DENY THOMAS' PETITION

A. Thomas Has Identified No Rule-Based Reason To Support Review of the Decision Below By the Court

The Rules of the Supreme Court outline the standards under which certiorari is usually granted, stating in relevant part that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10. Thomas has not, and cannot, point the Court to any of the enumerated reasons for granting his Petition.

Thomas has not alleged that the Second Circuit's decision to use unpublished memoranda and summary orders conflicts with the practice in many other jurisdictions. In fact, nearly all jurisdictions provide for the use of unpublished, summary decisions by intermediate appellate courts. See, e.g., D.C.

Cir., Circuit R. 32.1; Fed Cir., Cir R. 32.1; 4th Cir, Local R. 32.1; 5th Cir., Local R. 32.1, 7th Cir., Local R. 32.1, 9th Cir., Local R. 36-3, 10th Cir., Local R. 32.1; 11th Cir., Local R. 36-2.

Moreover, Federal Rule of Appellate Procedure 32.1, a rule promulgated by the Court under the power granted by 28 U.S.C. § 2072(a), specifically permits courts of appeal to limit the citation of unpublished opinions. The use of unpublished decisions therefore has been sanctioned by the Court and the practice employed by the Second Circuit cannot be "so far departed from the accepted and usual course of judicial proceedings" as to require review.

Finally, the use of this procedure clearly does not conflict with the decisions of the Court. Thomas has identified no such decisions nor has LabCorp located any.

B. Thomas Has Identified No Other Reason – And None Exists -- Supporting the Requested Review By the Court

Although the list of reasons for granting a petition for a writ of certiorari contained in Supreme Court Rule 10 is not exclusive, Thomas has presented the Court with no factual or legal reason demonstrating that the Court's review of the Second Circuit's use of unpublished summary orders is necessary or desirable. Thomas' petition on this issue rests on the conclusory argument that the use of unpublished opinions creates a "two-tiered system of jurisprudence" because

discretionary appellate review of unpublished opinions is "almost always" denied, which is "tantamount to the denial of a substantial right." (14a; 15a) (emphasis added). Thomas' position, however, confuses an appeal as of right with a discretionary appeal.

The appeal taken by Thomas to the Second Circuit was an appeal as of right. As such, the trial court was required to provide reasons for its decisions so that the appellate review to which Thomas was entitled, would be meaningful.

Thomas has no right of appeal from the decision of the Second Circuit, hence the Petition seeking this Court's discretionary review. Therefore, the manner in which the Second Circuit pronounces its decisions cannot interfere with or deny a "substantial right" of meaningful appellate review because no such right of review exists. Even if the method employed by the Second Circuit results in some cases being more likely to attract further appellate review, no right is implicated and no claim based on an equal protection or due process violation can be maintained.

The cases cited by Thomas demonstrate that his position is based on the inability to appreciate that no right to appeal from the Second Circuit unpublished opinion and summary order exists. For example, in Evitts v. Lucey, 469 U.S. 387 (1985) (cited by Thomas at 15a), the issue was whether the Sixth Amendment right to counsel entitled a criminal appellant to the effective assistance of counsel on the

appellant's first appeal as of right. Id. at 392. The Court, finding that such a right existed where the defendant had a right to appeal, specifically distinguished the case from one where a discretionary appeal was sought. Id. at 401. Likewise, in Lindsey v. Normet, 405 U.S. 56 (1972) (cited by Thomas at 15a), the question relevant to this matter was whether a double-bonding requirement for appeals of right from trial court determinations of claims under Oregon's Forcible Entry and Wrongful Detainer Statute (as opposed to a lesser bonding requirements for appeals as of right from other claims) was a denial of equal protection and due process. Id. at 64.

Where there is no right, there can be no equal protection of due process violation. For example, although this Court found in Evitts that a right to effective assistance of counsel existed for defendants appealing a conviction as of right for the first time, in Ross v. Moffitt, 417 U.S. 600 (1974), the Court found no such right where the criminal defendant's appeal was discretionary and appellate review as of right had already been provided by an intermediate appellate court. Id. at 611-618 (holding that criminal defendant had no right to effective assistance of counsel in seeking discretionary appellate review from North Carolina Supreme Court or from United State Supreme Court). Here, as in Ross, Thomas has been provided with a trial on the merits in the district court and meaningful appellate review by the Second Circuit. The Equal Protection Clause and the Due Process

Clause do not require that Thomas be similarly situated to all other petitioners when seeking discretionary review before this Court.

CONCLUSION

For all of the reasons set forth above, LabCorp respectfully requests that the Court deny the Petition to the extent that it seeks a review of the Second Circuit's use of an unpublished, summary order to affirm the dismissal of Thomas' claims against LabCorp.

Respectfully submitted

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REPLY BRIEF

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IN THE

Supreme Court of the United States

CLAUDE W. THOMAS, PETITIONER

v.

CITY OF NEW YORK, BENDINER AND SCHLESINGER, QUEST DIAGNOSTICS INCORPORATED, LABORATORY CORPORATION OF AMERICA HOLDINGS AND KERRY KELLY, M.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY TO THE OPPOSITION OF LABORATORY CORPORATION OF AMERICA HOLDINGS

Respondent Laboratory Corporation of America Holdings (hereinafter "LabCorp.") argues in its opposition that petitioner Claude Thomas fails to allege "...facts sufficient to support predicate claims for deprivation of procedural due process or equal protection," referencing the Memorandum Opinion and Order of November 19, 2004. Petitioner challenged this finding.

Where petitioner conclusively demonstrated that he did not ingest, inject or otherwise use the controlled substance morphine specifically calling attention to the omission of any reference to metabolite (which quantifies drug consumption) in the laboratory reports of respondents Bendiner and Schlesinger (hereinafter "Bendiner") and Quest Diagnostics (hereinafter "Quest") and where none of the respondents (neither the City of New York, the Chief Medical Review Officer Kerry Kelly, M.D., Bendiner, nor Quest) disputes, challenges or rebuts the assertion of petitioner's expert that the morphine present in the specimen was "free" of metabolite (meaning that the morphine was raw in the specimen and did not pass through the body), petitioner alleged facts sufficient to support a predicate claim for deprivation of procedural due process and equal protection.

As respondents did not challenge petitioner's claims of innocence or his expert's sworn declarations that respondents' laboratory reports do not show metabolite but rather the presence of "free" unmetabolized morphine, and where respondents City of New York, Bendiner and Quest robotically assert

that morphine was present in the specimen without elaborating or otherwise explaining the anomaly, these facts raise sufficient predicate claims for the deprivation of procedural due process and equal protection.

The Stipulation and Agreement of July 21, 1999 does not obviate petitioner's claim. Petitioner was discharged in spite of respondents' inaccuracy in reporting the results of the analyses of the disputed urine specimen. This perfidious silence exacerbated petitioner's work-related stress which continued after his discharge. As the Stipulation and Agreement were raised by respondent City of New York for the first time in its motion for summary judgment, petitioner was denied due process and the right to equal protection of the law as respondent failed to raise the Stipulation as an affirmative defense and did not seek leave of court to raise such a defense in its Answer. When respondent failed to raise the Stipulation as an affirmative defense, it was waived.

Where LabCorp. offers no explanation for its failure to perform the urine analysis, where the specimens, both primary and split, remain unaccounted for in violation of the statute mandating preservation, and where petitioner through no fault of his own was deprived of the ability to exonerate himself because the mishandling of the specimens by respondent City of New York and its agents—Bendiner, Quest and LabCorp.—petitioner was denied procedural due process and equal protection of the law.[1]

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[1] "Generally, the urine specimens were split into two, a 'primary' specimen and a 'split' specimen. A primary specimen is 'the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug

LabCorp., paid to the test petitioner's urine specimen solely for purposes of exoneration, states in its opposition as to petitioner's application for DNA testing for genetic markers and for another urine analysis, that LabCorp. was "...unable to confirm that the specimen belonged to Thomas, *and did not confirm whether the urine specimen contained morphine.*" [Emphasis Added] [Opposition, p.2] (According to LabCorp., there were "insufficient quantities of DNA to develop a profile.") Although LabCorp.'s representatives and employees were cognizant of petitioner's reason for requesting the DNA and urine analysis testing -- to exonerate himself of his employer's charges of morphine consumption -- LabCorp. remains silent and offers to this Court no explanation for why it failed to perform the urine analysis.

Further, respondents do not account for the disappearance of the primary and split specimens. The disappearance of these specimens prevented further testing that petitioner so desperately desired to prove his innocence. As a consequence of the disappearance of the specimen, petitioner was denied due process and equal protection. The district court found that the failure to properly store and test the specimen

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metabolite in his or her system.' 40 C.F.R. §40.3. The split specimen is that 'part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result.'" [Memorandum Opinion and Order of April 1, 2004] [App. 89a]

pursuant to 49 C.F.R Part 40 inured to the benefit of employees. [App. 119a] In addition, failing to maintain chain of custody, failing to adhere to privacy standards and employing an excessively low cut-off standard comes within the purview of 49 C.F.R. Part 40 and is actionable by an employee. [App. 119a]

Department of Transportation regulations provide that cut-off concentration levels up to 15,000 ng/mLs for the first drug screening test of morphine are to be reported (by the Medical Review Officer – here, respondent Kerry Kelly, FDNY's Chief Medical Officer) as negative. Bendiner engaged by the City to perform workplace testing, performed the first drug screening test and reported a presence of 1,353 ng/mLs of morphine, well below DOT regulations. Respondent City of New York employed an excessively low cut-off of 300 ng/mLs. DOT regulations require the retest or confirmatory test to be reported as negative where there are fewer than 2,000 ng/mLs. Quest's retest of the disputed specimen showed 200 ng/mLs. Petitioner was not returned to work, however. Notably, on March 23rd, 2005 respondent City raised its cut-off concentration level for opiates which includes morphine to 2,000 ng/mLs. from 300 ng/mLs. Thus, under the DOT regulations and the revised FDNY cut-off concentration level, the specimen attributed to petitioner was negative.

The district court also said the following:

> In the April 1 Order, I noted that it is a violation of a federal right, not simply a federal law which is required to form the basis of a Section 1983 action. *Blessing v. Freeston*, 520 U.S. 329, 340 (1997). I found that just as inadequate notice and the lack of a re-testing opportunity

> interferes with a employee's ability to defend himself and challenge the validity of a positive test result, *Burka v. New York City Transit Auth.*, 739 F.Supp. 814 (S.D.N.Y. 1990), improper storage and breaks in the chain of custody of a specimen likewise interfere with an employee's ability to defend himself in that the specimen itself is denatured or not available for retesting—which by extension amounts to a denial of due process. However, I also determined that in order to hold municipal defendants (and laboratory defendants acting as instruments of the government) liable under a Section 1983 action, plaintiff is required to establish that the violations occurred pursuant to an established policy, practice or custom, or that a high official was directly involved in the mishandling of the specimen. [Memorandum Opinion and Order of November 19, 2004, App. 62a]

Not only was Dr. Kelly responsible for summary denials of petitioner's request for leave of absence after personally diagnosing him with situational stress on March 1, 2000, as the DOT qualified Medical Review Officer, petitioner alleges that among Dr. Kelly's duties and responsibilities was the duty to analyze laboratory test results resulting from workplace testing and that those results were reported improperly. [Compl. ¶125] Respondent City of New York does not dispute this assertion. [Amended Answer, ¶31]

Petitioner asserted that Dr. Kelly's policy requiring her personal approval for DNA testing interfered with his ability to obtain the DNA test. [Compl. ¶¶137-155] On December 31, 2002 petitioner

executed and delivered to Quest authorization for the DNA testing of the disputed specimen to be performed by LabCorp. Thereafter, Quest rejected the authorization advising that FDNY internal policy required Dr. Kelly's authorization for transfer of the specimens. The deputy commissioner lacked authority to authorize transfer of the specimen for DNA testing advising that Dr. Kelly's authorization was necessary. The FDNY specimen was transferred on February 6, 2003, the date Dr. Kelly transmitted her authorization. [Compl. ¶¶137-155].

Dr. Kelly set the policy regarding the excessively low cut-off levels and the policies and procedures of the medical department as its Chief Medical Review Officer. Therefore, Dr. Kelly is a high official as defined by the district court in the Memorandum Opinion and Order of November 19, 2004. [App. 62a]

Respondent calls attention to the district court's finding that the complaint fails to assert that LabCorp. knew the petitioner was African American. [Opposition p. 4] Respondent overlooks the district court's finding that:

> Interpreting plaintiff's complaint liberally, he alleges that the actions of the laboratory defendants with respect to the testing, storage and reporting of his urine sample violated his federally protected rights. It can reasonably be inferred from the complaint that the procedures employed by the laboratories with respect to testing of samples from FDNY employees are consistent with procedures outlined by the FDNY. For example, each laboratory is on a short list of New York State approved

laboratories for drug testing. In addition, each laboratory appears to adhere to cutoff standards employed by the FDNY, which are lower than those adopted by the DOT. It is also clear that the laboratories are entwined in the employment procedures of the FDNY, as they are responsible for the drug testing which, with a positive result, can lead to the termination of one's employment with the FDNY. The inference to be drawn is that the laboratories appear on this list specifically because when testing samples from state employees, they adhere to a policy adopted by either the New York State or the FDNY. See *Griffin v. Long Island Railroad*, 96-CV-4673, 1998 U.S. Dist. LEXIS 19336, *18, n. 7 (E.D.N.Y. June 5, 1998) (noting that if the railroad was a private entity, its compliance with regulations compelling drug testing would mean it was acting as an instrument of the government) (citing *Skinner v. Railway Labor Executives's Ass'n*, 489 U.S. 602, 614 (1989).

Another inference that is fairly drawn from the complaint is that the laboratories received a substantial amount of revenue from their relationship with the State as approved laboratories for all drug testing of state and municipal employees. See *LeBianc-Sternberg v. Fletcher*; 67 F. 3d 412, 432 (2d Cir. 1995) (citing, *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. 614, 621 (1991) (holding that "in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine... the extent to which

> the actor relies on governmental assistance and benefits...") internal. Citations omitted).
>
> Finally, the complaint meets the test for state action because the facts alleged suffice to permit an inference that the laboratory defendants performed testing and held custody of the plaintiff's urine sample at the direction of the FDNY, that such actions were in furtherance of enforcement of the FDNY's drug testing regime, and that the actions of the laboratories in so doing were the responsibility of the FDNY. See *Coleman v. Town of Hempstead*, 30 F. Supp. 2d 356, 362 (E.D.N.Y. 1999). At this early stage of the litigation, it is reasonable to infer that the laboratory defendants were acting as instruments of the government and, accordingly, may be held accountable under Section 1983. [Memorandum Opinion and Order of April 1, 2004, App. 103a-105a]

Hence, where the laboratory defendants acted at the behest of FDNY, it is reasonable to infer that LabCorp. acted as FDNY's agent. Therefore, it is irrelevant that LabCorp. may not have known of petitioner's ethnicity as it claims. Enforcement of the excessively low cut-off level, the impropitious handling of the specimens, not protected or preserved as required by the statute (49 C.F.R. §40.3), documented breaks in the chain of custody, presents a glimpse through petitioner's lens into the hostile environment in which he subsisted. [App. 103a-105a]

LabCorp. offers this Court no explanation as to the whereabouts of petitioner's specimen or for its failure to produce drug screening results for which

petitioner paid. LabCorp.'s posture is the metamorphosis of the hostile work environment resulting in denial of due process and the right to equal protection.

Petitioner filed a timely complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") regarding two incidents of harassment by his supervisor, a captain. In the EEOC complaint, petitioner described an abusive work environment where on November 15, 1999, petitioner's captain, in the presence of other firefighters, members of FDNY's Bureau of Health Services and union delegates ordered petitioner to ascend the firehouse stairway. When petitioner failed to move as quickly as the captain would have liked, the captain pressed his finger into the flesh of petitioner's cheek screaming "Motherf---er, who do you think you are? When I give you a f---ing order, you better listen boy, you f---ing a—hole.] [App. 21a, Compl. ¶42] The captain suspended petitioner for 30 days therefor stating, "we got you nigger." On the date of petitioner's return to the firehouse from the suspension, the captain suspended petitioner for a second consecutive 30 day period, this time for failing to modulate the volume on television quickly enough. [App. 22a] Petitioner suffered chest pains as of result of the confrontation and second consecutive suspension and was removed from the workplace by ambulance. The district court characterized these events, suspensions from November 15, 1999 to December 14, 1999 and December 14, 1999 to January 13, 2000, confrontations by the captain, hospitalization, as "isolated" instances and declared them time barred. With leave of the court, petitioner timely incorporated the EEOC complaint into district court complaint after petitioner

received a right to sue letter from EEOC. [Compl.¶20, 21]

The district court did not consider that petitioner was being treated by a private psychiatrist for job-related stress from in or about 1999 to a period well-after the commencement of the action in 2003, that Dr. Dudley, petitioner's psychiatrist, wrote to respondent Dr. Kelly as the Chief Medical Review Officer on February 14, 2000, and again on March 7, 2000 requesting a leave of absence because petitioner suffered from job-related stress. [1] Dr. Kelly acknowledged receipt of the psychiatrist's repeated requests and also admitted that petitioner presented to the medical department on at least 28 occasions complaining of job-related stress. Dr. Kelly personally confirmed the diagnosis. [Dr. Kelly's Aff. ¶41 and 42] Dr. Kelly summarily denied the requests. Hence, petitioner's firing in the absence of proof of drug ingestion creates an inference that the hostile environment facilitated the laboratory defendants' inaccurate reporting of the drug screening results with impunity which Dr. Kelly was in a position to correct and respondent City of New York never corrected.

In a recent decision reported in the New York Law Journal, (09/09/09, 06-5605cv), 2009 U.S. App. Lexis 20024, the Second Circuit in *Aulicino v. The New York City Department of Homeless Services, Inc.*,

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[1] Dr. Dudley averred that, "I aggressively sought an evaluation of his [Mr. Thomas'] hair and urine acquiring a test of his hair follicles and an independent analysis of his urine as I was convinced that defendant FDNY's results were in error." [A96] Dr. Dudley delivered the negative drug screening test results pursuant to FDNY's letter of suspension requesting some action on behalf of appellant within seven days. [A501]

remanded a case dismissed by the district court because the racial comments uttered by appellant's supervisors were "too isolated and discrete." In reversing the district court, the Second Circuit quoted from *Cruz v. Coach Stores, Inc.* 202 F.3d 560, 570 (2d Cir. 2000) quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) as follows:

> To survive summary judgment on a claim of hostile work environment harassment, a plaintiff must produce evidence that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'

Petitioner alleged in his complaint that after signing the Stipulation and Agreement of July 21, 1999, he "was subjected to a continuing pattern and practice of discrimination which was manifested by aggressive, threatening, confrontational behavior by plaintiff's superior officers in the form of verbal and physical abuse, often in the presence of co-workers and union representatives." [Compl. ¶40, 47] Petitioner described the above-referenced incidents involving his captain. Citing *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997), in petitioner's case, the Second Circuit stated the following:

> To prevail on such a hostile work environment claim, a plaintiff must show conduct 'severe and pervasive enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive.'

In determining that no reasonable juror could infer that the "two incidents" were severe and pervasive enough to create a hostile work environment, the Second Circuit opined that the incidents involving the captain, "occurred before plaintiff filed the EEOC claim that allegedly trigger the retaliation. They could not, therefore, have been in retaliation for the claim. And to the extent that the retaliation claim was based on other events that are referenced in the complaint, it is barred by the Stipulation." [App. 4a, 5a]

In petitioner's case, the district court failed to consider the severity or "the totality of circumstances" surrounding petitioner's case as expressed in *Aulicino v. The New York City Department of Homeless Services, Inc.* Respondent City herein diagnosed petitioner with job-related stress and acknowledged that he presented 28 times to respondent's medical facility in connection thereto. Petitioner was under long-term psychiatric care for job-related stress and according to petitioner's doctor, a leave of absence was necessary. It is petitioner's position that the incidents with his captain illustrate sufficiently severe and pervasive insult, abuse, hostility and ridicule carried-out before co-workers, members of other departments and union delegates to demonstrate a hostile work-environment. The fact that petitioner submitted to the district court undisputed, admissible evidence that he did not use drugs, his discharge was perpetuated, and the failure to correct this travesty of justice is but a permutation of the hostile work environment.

The district court cites *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 437, "Indeed, 'even a single episode of harassment, if severe enough, can establish a hostile environment.'" Then quoting *Rodgers v. Western Southern Life Insurance Co.*, 12

F.3d 668, 675 (7th Cir. 1993) the district court states the following:

> Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of subordinates.

Petitioner's captain used this unambiguous term in the presence of subordinates and then suspended petitioner for 30 days. By engaging in this unabashed, brazen conduct in front of petitioner's co-workers, members of the Bureau of Health Services and union delegates, the captain carved in stone that abusive treatment of petitioner was a condoned practice. This practice was adopted by the laboratory defendants (who obtained petitioner's urine samples from the Bureau of Health Services) and permeated the workplace creating an abusive work environment.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Supreme Court grant review.

Respectfully submitted,
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